THE PROBLEM OF MINORITIES

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PREFACE

The work presented in these pages is mainly based on a thesis submitted to the University of Calcutta in 1933 in support of the author's candidature for the degree of Doctor of Philosophy of that University More than six eventful years in the present dynamic age of thought and action have passed since then, and naturally a considerable part of the work, especially those pages which are more or less a narrative of events, would appear to the reader rather out of date For this the author would crave his indulgence But he could not help it It was perhaps not proper for the author to alter in fundamentals the basic structure of the thesis upon which the Board of Examiners had been invited by the University to adjudicate Besides, the earlier portions of the book were in the press about three years ago so that the author had no opportunity to revise them in the light of developments that emerged from time to time in the hectic period through which the world was passing Yet, no pains have been spared, so far as the circumstances permitted, to bring the book in conformity with the recent trend of events in India and outside Fundamentally, however, the thesis sought to be enunciated in these pages stands unaffected not only as a critical analysis of past events but also from the point of view of political theory, and the author should consider his labours amply rewarded if the book would throw some light on what is regarded as one of the most complex problems in the history of the human race in the prevailing confusion of ideas and conflict of ideologies

No problem perhaps has taxed the brains of statesmen in India and the other parts of the world more than the adjustment of the rights and obligations of divergent religious, racial and linguistic groups of mankind in municipal as well as in international law Throughout history minorities have been given a

back seat in Constitutions where majorities govern But there is an increasing measure of appreciation of the fact that minorities deserve better treatment and more generous recognition as much in the interest of the State concerned and of world peace as in that of the minorities themselves There is practically no State in the world which does not contain racial linguistic or religious minorities One of the pressing and urgent tasks of democracy to-day is to secure adequate and effective protection for them and to associate them in the work of administration The tyranny of the few is bad the tyranny of the many is not less so The tyranny of either type strikes at the root of good and stable government and contains within itself the germs of conflict and strife

In certain parts of Europe within the mechanism of the State and subject to its general tenor temper and ideology an attempt has now and then been made to establish a minimum standard of decency in public administration by means of statutory guarantees in respect of life and liberty In those parts the minorities have had some measure of security and the problem of their protection *cannot be said to have given them any serious troubles in recent* times But the situation in Central and Eastern Europe has been entirely different where territorial re-distribution has been as *frequent* as racial conflicts have been acute and almost interminable For these parts of Europe the Great Powers had for more than a century asserted the principle of international intervention apparently in the interest of the minorities The principle came as a legacy to the Peace Conference of 1919 which took a more decisive move than had been taken in the past to strengthen the scheme of protection in broad principles and in details As a result there emerged a series of international agreements known as the Minorities Guarantee Treaties These Treaties not only outlined the fundamental rights of the people and made specific provisions for the protection of religious linguistic and racial minorities but also laid down the procedure of supervision and control by the League of Nations Declarations of fundamental rights applicable as they were to all sections of the people like measures of special protection for the national minorities, formed an essential and integral part of the scheme of minorities protection under the ausp ces of the League Large parts of Europe

were, however, deliberately left outside the purview of the Minorities Guarantee Treaties

The past tense, it should be noted, has been used here purposely For the very existence of the Central and Eastern European States is now threatened One of these has already fallen a victim to the predatory passion of totalitarian dictatorship Others seem to be awaiting with awe and in panic the tragic fate that has overtaken Czechoslovakia Memel has gone to Germany Poland is now in occupation partly by Germany and partly by Soviet Russia despite the brave and solemn words uttered by the British Prime Minister What remains of Rumania if Germany is assured of her economic penetration into that State? The fall of Albania as an autonomous State is an accomplished fact The fate of Finland and the other Baltic States is hanging in the balance Every small State in Central and Eastern Europe is in daily and deadly peril It is not the object of this book to discuss the merits of the Versailles Treaty Suffice it to say, however, that it was bad enough, but is not Europe in her mad race for power going from bad to worse, from the frying pan, as they put it, into the fire? Man's faith in the code of international honour and morality has been rudely shaken But did it ever exist? It seems that the rule of force is more appropriate to politically organised communities as they are at present than the reign of law! All that has been written in these pages about the Minorities Guarantee Treaties and the States that were sought to be covered by those Treaties must be read subject to the dramatic turn of events in Europe and the new developments in the international situation which it has brought into being

In the United States of America and in some Dominions of the British Commonwealth provisions have been made in their Constitutions as well as in the laws and regulations made thereunder for the protection of minorities These safeguards are varied in character and wide in their scope They include political representation in certain cases and also provisions as to the use of minority languages, allocation of public funds and control of religious, educational and charitable institutions of the minorities The American system, however, relies mainly on a charter of fundamental rights and the comparative rigidity of its Constitu-

tion The self governing Dominions have sought to create nationalities within a broader British nationality so that in theory and in practice His Majesty s Indian subjects have been deprived by immigration laws and other methods of political civil and economic rights of citizenship In those places the principle of discrimination as between a citizen and a citizen on grounds of colour and race has been freely applied They have established the doctrine that common British citizenship does not carry with it *common rights and privileges* The *incidence of British* nationality, that is has been made to vary from place to place in the British Commonwealth

An account has been given in the book of the position of minorit es in Germany under the Weimar Constitution Since the emergence of Nazi dictatorship the guarantees in regard to their protection have lost all their significance except perhaps in a historical setting Switzerland which is also dealt with n these pages stands out unique in this respect inasmuch as the basic structure of its Constitution has not to any material extent been affected by the forces that have been in operation in Europe dur ng the last few years Its quiet wisdom its rational and sympathetic and human approach to the complicated problems of racial and linguistic groups and its abiding faith in a composite nat onality with cultural and linguistic autonomy in the background have stood it in good stead in resisting and repelling destructive and disruptive forces

Attention is invited to the far reaching constitutional changes that have been effected in Soviet Russia since this book was sent to press The first Soviet Constitution no less than the *subsequent amendments* of 1923-25 sought to set up to quote the well known Marxian phraseology, a dictatorship of the proletariat A dominant part was played in the organisation of the Revolution and the consolidation of its gains by the workers with the result that a large section of the population was deprived of the elementary rights of citizenship There was deep distrust of the *bourgeoisie kulak s* remnants of the landed aristocracy nobility and the Czarist official hierarchy by the Soviet workers Under the Stalin Constitution of 1936 equal electoral rights have been conferred on all adult citizens of the Union irrespective

of nationality, race, sex, status, or social origin so that all power in the U S S R belongs to the toilers of the town and village including those who work by brain The equality of rights of the sexes, races and nationalities is of course no innovation, it was recognised from the very beginning of the new era But "the class alien elements" as they were called, whose number is decreasing rather sharply, have now been accorded the rights of full Soviet citizenship Any direct or indirect limitation of the principle of equality of rights in this behalf or the propaganda or spread of hatred against any race or nationality is treated as a criminal offence Private property in a sense is permitted, but no one is allowed to use it for the exploitation of other people's labour power All elections are direct and by secret ballot and held on a territorial as distinguished from a functional basis Included in the Fundamental Rights of Soviet citizens are the right to work, the right to leisure, the right to adequate support in old age or in the case of incapacity and the right to education of all children and young men and women to the full limits of their capacity and irrespective of the social position of their parents There is an ample measure of freedom of speech, the press, meetings, demonstrations and processions, and contrary to the popular belief in democratic countries or elsewhere freedom to practise religious rights is enjoyed as much as freedom to preach anti-religious doctrines What is prohibited is any propaganda or measure calculated to restore capitalism or landlordism These constitutional changes should be borne in mind while reading the author's observations on the position of minorities in Soviet Russia incorporated in the book

Nowhere, except perhaps in the States of Central and Eastern Europe, has the problem of the protection of minorities been so acute and complex as in India The vast size of the country, the clash of faiths and the multiplicity of its tongues have complicated the situation An additional factor is the fact of British domination The main point of difference between the position of minorities in India and that of minorities in Europe requires stressing The Versailles Treaty, for instance, transferred large masses of population from one State to another and placed them under the control of peoples whom formerly they had governed In the process there

was a drastic change in the situation with the change of nationalities No such question has arisen in India The problem here is municipal rather than international It is, therefore, not safe to seek for guidance in every detail from Geneva in solving or tackling the problem of minorities in the great Indian continent On the threshold of vast constitutional changes it was but natural for minorities to demand statutory safeguards for their due protection in legislation and administration The demands put forward by them embraced a wide range of subjects such as declarations of fundamental rights effective representation in the Legislatures, Councils of Ministers and Public Services, the system of separate electorates, allocation of public revenues for the benefit of certain minorities, the vesting of residuary powers at the Centre or in the units, as the case might be, safeguards against commercial discrimination and the Governor General and the Governor s extraordinary powers in ultimate resort for the protection of minorities Some of those demands have been inserted in their entirety and the others partially in the Government of India Act, 1935 Each of these topics has received adequate and scientific treatment in these pages and every attempt has been made to avoid communal bias and racial prejudice in the criticisms made and the suggestions offered

The book has been divided into three parts The first part deals with the principles of international intervention evolved in a somewhat intelligible form at the Congress of Vienna 1814, and extended to a considerable extent at the Conference of Paris 1919 In the second part are examined the safeguards provided for minorities in the United States of America Switzerland Germany under the Weimar Constitution, Soviet Russia prior to the constitutional amendments recently made and the self governing Dominions of the British Commonwealth and also political and economic disabilities which some of the Dominions have imposed upon the native races and His Majesty s Indian subjects The third part is devoted exclusively to the Indian problem of the protection of minorities The object of this volume is to trace the history of the problem from 1814 onwards, to discuss the principles of protection both in municipal and international law, to examine to what extent and in what particulars those principles may be applied to

Indian conditions and to deal exhaustively and in a spirit of scientific detachment with the provisions of the present Government of India Act in this regard It is an attempt at solving the complicated and delicate problems which have engaged for many years now the earnest and anxious attention of British and Indian statesmen and seeks to throw light where, in the judgment of the author, it is so sorely needed

The author owes an immense debt to Sir Tej Bahadur Sapru and Mr K Zachariah, M A (Oxon), I E S , now Principal of Islamia College, Calcutta, who, by ready supply of an exhaustive bibliography, first put him on the track Among others who have been endlessly helpful, both by their suggestions and criticism in conversations, special mention must be made of Dr Pramathanath Banerjea, M A , D Sc (London), Barrister-at-Law, and sometime Minto Professor of Economics, Calcutta University, Professor S C Roy, M A , late of the same University, and Mr P K Roy, M A , B L , Advocate, Calcutta High Court Professor A B Keith, Professor Harold J Laski and the Right Hon'ble M R Jayakar, who constituted the Board of Examiners, have placed the author under obligation by suggesting improvements which have been incorporated in the book as far as possible It should be added that none of these gentlemen is responsible for the statements made and the views expressed in this book for which the author takes the entire responsibility Thanks are due to Mr Basudha Chakravorti, M A , and Mr Amulya Ranjan Dasgupta, B A , for the ungrudging assistance they have given the author in preparing the index and correcting the proofs The author must also express his sense of gratitude to Dr Syamaprasad Mookerjee, late Vice-Chancellor of Calcutta University, Mr J C Chakravorti its Registrar and the University Press staff for their kindly placing at his disposal all the facilities that the resources of its press permitted

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Part I.

CHAPTER I.

INTRODUCTORY.

The ancient world and the modern world compared

The problem of minorities is one of the most perplexing and intriguing problems of modern democracy. The ancient world or the Middle Ages had no knowledge of the State as we know it to-day. The former developed the City States such as Athens and Sparta and also great Empires such as those of Persia and Macedon. The Roman Empire gave the latter the idea of a world Empire But the nation State which is neither so small as a Greek city or a Swiss canton nor so large as the Empire of Rome or of Macedon or of Persia is purely a modern concept dating from the Renaissance By a nation State is meant a people bound together by common descent, community of language and religion, a common memory and a common ideal and "organised for law within a definite territory" A nation State, in other words, is both a nation and a State—the State is so formed and organised that its territorial limits generally contain a distinct national group The nation State, however, is not yet a realised goal. It is in the process of realisation and still an ideal in large parts of the world The Jews, for instance, are scattered all over the globe and do not own a State which they may call their own in spite of Palestine which is called their homeland Switzerland embraces three or four creeds and speaks as many languages The United States of America does not, for obvious reasons, correspond to an American nation. Britain herself contains not only Wales

and Scotland but a part of Ireland Considered from the stand point of the definition generally accepted none of those States technically speaking, is a nation State There is of course much to be said in favour of Delisle Burns thesis that the national sentiment was felt as a real political fact at the partition of Poland (1772), that "it gave force to the Spanish resistance against the French Government from 1806 until 1813 " and that "it produced the defeat of Napoleon at Moscow and the revival of Germany * But had *the ideal* of the nation State been realised the Balkan States would not have been faced with the problem of reconstruction of national groups under the Treaty of Bucharest in 1913 or the world would not have felt called upon in 1919 to make an attempt to bring the State system of modern Europe into conformity with the theory and facts of nationality The attempt, however, has been only partially successful Nor need there be fear on this score, for the events in Central and Eastern Europe point unmistakably to the necessity, as an effective and satisfactory means of solving the problem of minorities and securing peace on earth for the deflection of nationality from politics to its true region the realm of culture of ethics and of psychology Statesmanship seems to demand that the future should be allowed to rest as in Czecho-Slovakia on the growth and development of *de politicised* nationalities † a *thesis developed at some length in the subsequent* pages of the book

State sovereignty receives a check

Two other dominating ideas of the nineteenth century were the theory of the *sovereignty of national* States and the message of democracy A State is sovereign when it is supreme within its borders so that no other *State or States can interfere* with its internal arrangements the evolution of its Municipal Law and its procedure and functions Such a State claims power and authority to protect its citizens outside its own boundaries So we find as Professor Laski shows Germany protecting the Mannesman brothers in Morocco and England coming to the aid, when necessary of the Rothschilds in Egypt But the idea of complete and unqualified sovereignty

* Delisle Burns: Political Ideals pp 184 185

† A. Zimmern The Third British Empire pp 167 192.

seems to have received some check in the procedure of the Peace Treaties of Europe signed from time to time and of late in the creation of the League of Nations at Geneva. We are not so much concerned here with the problem of national sovereignty except as a side issue as with the ideal of democracy which is gaining in strength and momentum in all parts of the world, though held temporarily in check, and which is relevant to and vitally connected with the problem of the protection of minorities.

Various democratic devices

Now democracy is a society not of similar persons, but of equals in the sense that each is an integral and irreplaceable part of the whole. The ideal of democracy has been sought to be realised by the creation of various devices and instruments of popular government The franchise and the ballot box are the oldest and primary essentials of democracy In most modern States, specially after the War, those features have been accepted without demur, although universal adult suffrage is yet an unattained ideal in some of them. Then the executive has been rendered powerless to act arbitrarily and in defiance of public opinion by placing it under the control of the legislature as in England, France and the self-governing Dominions, or of the electorate as in the United States of America The process of punishment for executive offences is no doubt long and arduous and the executive found guilty of violating the principles of the constitution may not be immediately brought to their senses But the ultimate control is there and effective for all practical purposes in ordinary circumstances. In this connection we cannot, however, ignore the alarm raised by the Lord Chief Justice of England in his book called the *New Despotism* where he has exposed in incisive language the pretensions and encroachments of the bureaucracy He has shown how the sovereignty of Parliament has been rendered nugatory and the jurisdiction of the courts ousted by a vast mass of departmental legislation which has the force of law but is not subject to revision or review by the courts Parliament knows nothing of it and the courts have no jurisdiction over it Lord Hewart's timely protest proves that some of the best minds of England have been very sorely exercised and there is already a searching of hearts among men in authority. The separation of

powers, provides another safeguard against autocracy The expression is used in countries where *droit administratif* is familiar in the sense that while the judges in the ordinary courts ought to be independent of the executive, the Government and its officials ought to be free from the jurisdiction of the ordinary courts In a country where the Rule of Law prevails it emphasises the principle that the judges are independent of the executive

The need for an impartial and independent judiciary

The demands of democracy call for an independent and impartial judiciary not subservient to executive control or the precarious verdict of the ballot box It is because the tenure of the judges in England is determined by good behaviour that the English citizen owes his personal liberty mainly to the judicial decisions For centuries the English judiciary has been found protecting boldly and valiantly the popular rights against Royal or executive encroachments and, in the process, incurring the displeasure of the Crown To Chief Justice Coke, more than to anybody else, or any constitutional charter of liberties, is England indebted for the development of the Rule of Law and its vindication She has no doubt the Magna Charta, the Bill of Rights and the Petition of Right, but the Rule of Law and judicial decisions constitute the sheet anchor of personal freedom of the British citizen In England, for example, no man is punishable or can be made to suffer in body or goods except for a distinct breach of law proved and established in an ordinary and thoroughly legal manner before the ordinary courts of law Secondly, no man is above the law which means that every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals * Thirdly, every citizen s legal rights or liabilities are generally determined by the ordinary courts of law and each man s individual rights form the basis of the constitution rather than flow from it It is not to be supposed that there can possibly be no personal freedom except under the Rule of Law as it has developed in England In a large number of modern States, the principles of the Rule of Law are embodied and incorporated in a constitutional charter of the Fundamental

* Dicey : The Law of the Constitution, p. 189

Rights of citizens. The world has moved so fast indeed that such a charter embraces within its range not only political, social or religious rights, but also rights which are purely economic in character. We find in the German charter of constitutional rights ample provisions for economic independence of the German citizens. The idea is extremely important, for the conception of democracy as it has been defined embraces every aspect of the life of the citizen. He seeks religious freedom in order to realise the truth his religion embodies. He seeks political freedom for his full and complete development as a political being. He seeks economic freedom for "the satisfaction brought by making an end of the frustration to his personality an irrational subordination implies." Whether under the Rule of Law or under a statutory charter of the Fundamental Rights, the citizen in modern States has some chance of safeguarding his personal freedom against invasion either by a Department of the Church or of the State or by an organisation of the capitalists.

The modern State generally a nation State

The modern State, as has already been pointed out, is more or less a large nation State, and it is not possible, as in the case of the Greek City State, for all the citizens to meet together, deliberate on questions of policy and take decisions We have as a result representative government in which the interests of the people are supposed to be protected by their own accredited delegates or chosen representatives But the delegates or representatives who enjoy legislative tenure for a fixed period of time are liable to outside influences and temptations of various kinds And hence arises the necessity of safeguards Some of the States have adopted the instruments of initiative, recall and referendum by which the electorate can, under certain conditions, respectively initiate legislative proposals, unseat their delegates or representatives and decide issues raised in Bills on the legislative anvil The advocates of democracy have further introduced a new democratic device in the machinery of Federal government for the purpose of reconciling "national unity with the maintenance of State rights" In humbler spheres the same ends are sought to be realised by local bodies such as the London County Council or the Calcutta Corporation.

But have all those devices been able to transmit the force of individual opinion and preference into public action which is the crux of popular institutions? What is the use, asked Hare and Mill, of broadening and extending the franchise unless all the parties have representation on the legislature? Did not the minorities run the risk of being swamped, and was not there the possibility of representative democracy turning in the course of time into an unqualified and intolerable tyranny of the majority? These questions were put but were not everywhere boldly faced Attempts have been made in certain parts of the world to give by the method of proportional representation, a fair, if not accurately proportionate to their numerical strength, share, to the different parties, of seats in the legislature The system of proportional representation has not, however, been accepted in England, although the complaint of the Liberal party has been persistent for some years past that their voting strength in the country is much larger than their representation in the House of Commons The reasons which influenced John Stuart Mill in fighting for a change in the electoral method and procedure in England hold good in the case of those who demand statutory protection of racial, linguistic and religious minorities—the subject of our study in this book

The problem of representation of the minorities federation and development of local autonomy

We have given a short sketch of political changes and modern tendencies in political institutions We have shown that the City State had given place to the conception of a World Empire and that the latter in its turn gave place to a modern nation State The nation State has brought to the fore peculiar problems of its own and is struggling in its natural course of development and in the interaction of contrary forces to find how far it can proceed in pursuance of an aggressive nationalist platform and programme and where it should stop It has raised the question of representative democracy which has given rise to such complicated questions as the form and procedure of representation in the legislature, of federation and development of local or rural autonomy, of different kinds of democratic machinery and charters of Fundamental Rights of the people Some of these subjects are directly or indirectly connected

Scope of our enquiry

with the problem of the protection of minorities. By minorities are here meant not social or political minorities but persons or groups of persons who differ from the majority of the population in a country in race, religion or language. They may be citizens of a foreign State or nationals of the country concerned. The interests of the former are generally safeguarded by the foreign State of which they are citizens National minorities may be protected in two ways, namely, (I) under Municipal Law and (II) by International Agreements or Treaties Both these methods of protection we propose to discuss in detail in the following pages

The principle of minorities protection long recognised in Europe

The principle of protection of racial, linguistic and religious minorities is no new thing on earth We find early trace of such protection in the Peace of Augsburg, 1555, the Pact of Warsaw, 1573, the Edict of Nantes, 1598 and the Treaty of Westphalia, 1648 Henry of Navarre granted under the Edict an unexampled measure of religious toleration to the Huguenots in France The Treaty of Westphalia not only confirmed the agreements in the previous Treaties but introduced the principle of joint action and common responsibility on the part of the Signatory Powers and thus anticipated the Covenant of the League of Nations The Treaties, it ought to be noted, dealt more with the religious rights of minorities than with their linguistic or cultural rights The principle of joint international action, however, took centuries to assume a somewhat definite shape and character We shall confine our observations and comments to the period dating from the Congress of Vienna in 1814 down to this day—a little more than a century, for in that Congress the rights of minorities had been guaranteed more definitely and specifically than previously in an International Treaty of Peace introducing a principle which was later consolidated and extended in 1919 when the whole of Europe was in a melting pot

CHAPTER II

The Historical Background

Before we pass on to the Congress of Vienna let us discuss the constitution of Norway as it stood in 1814 in which the protection of minorities was stipulated It should be noted at the very outset that the Norwegian constitution was not essentially the work of an international gathering in the sense the League and other settlements are For more than four hundred years until 1814, Norway had formed part of the State of Denmark Under the Treaty of Kiel Norway was ceded to Sweden The Norwegian people opposed the annexation and framed and adopted a constitution of their own and invited a Danish Prince to become their King Thereupon the Swedish invaded Norway which was subsequently compelled to accept a union of the Crowns The Danish Prince abdicated but Sweden agreed to treat Norway as a free, independent and indivisible kingdom The union of Sweden and Norway raised the question of the protection of racial and linguistic minorities

The union of Norway and Sweden.

The constitution provided that while the King was in Sweden a Norwegian Minister of State and two members of the Norwegian Council of State would always be in attendance upon him The duties and functions assigned to them were the duties and functions of the Government of Norway All Norwegian business had to be brought before the King through those Norwegian Ministers No Norwegian business could be dealt with or disposed of except in their presence All petitions from the citizens of Norway to the King were to be presented, in the first instance, to the Norwegian Government and the petitions together with the report of the Norwegian Government thereupon were to be submitted for the consideration of the King All orders of the King concerning the affairs of Norway required for their validity the counter signa

How the rights of the two peoples were safeguarded.

time of its Minister of State. The Norwegian Minister of State and the two Norwegian Councillors of State who were in attendance on the King in Sweden had to be given seats on the Swedish Council and the right to vote when matters affecting both the kingdoms were discussed and dealt with It was also laid down that except in the case of urgency the opinion of this Norwegian Council should be obtained before any joint deliberation took place (Article 38) This procedure of joint business was further adopted in the matter of declaration of war and conclusion of peace. The King was invested with the power to mobilise troops, to declare war, to conclude peace, to enter into and break off alliances and to send and receive ambassadors But before taking any action in exercise of the powers conferred upon him the King had to communicate his views to the Norwegian Government and obtain its opinion thereon along with a full report as to its real position in respect of its finances, means of defence and so forth. A similar report had to be procured from the Swedish Government Thereafter the King had to summon an extraordinary Council of State to which the representatives of both the Governments were invited and to explain to them the reasons for such action and to lay on the table the reports of the two Governments concerned on the exact state of things prevailing in their respective States The King's proposals formulated in the light of reports received had to be placed before the extraordinary Council The advice tendered to the King by each Minister on the subject or subjects under discussion had to be entered individually and separately upon the minutes of the Council The final decision, however, lay with the King (Article 26) It was further provided that the Storthing must have, laid before it, the minutes of the Government in Norway as well as certified copies or extracts from the minutes kept by the Norwegian Minister of State and two Norwegian Councillors of State in attendance upon the King in Sweden (Article 75)

The composition of the Joint Committee and Council

Norway's share of control over the joint business of the two kingdoms was strengthened by its partial control over the succession to the Crown. During the King's minority

a Council of State composed of equal numbers of Norwegian and Swedish members were to carry on the administration of the union in conformity with the general principles of the two constitutions until their representatives made due provision for the purpose (Article 40) If, however, there was no Prince entitled to the succession, the King could recommend his successor to the Storthing The final decision lay with that body in the case of disagreement between it and the King

Protection of language religion and nationality

Equality of status of both countries was secured by statute (Article 42) In times of peace none but Norwegian troops could be stationed in Norway and similarly none but Swedish troops could be stationed in Sweden save only in the case of annual manoeuvres of the two armies Ordinarily the warships of each kingdom were manned by its own seamen Neither the army nor the navy of Norway could be used for any offensive war without the assent of the Storthing Norway had her own bank, controlled her own currency system and maintained her own separate treasury, and her revenues had to be applied exclusively to her own purposes and were not liable for any other than her own national debts

The language, religion and nationality of Norway were also protected by various provisions in the constitution It was laid down, for instance, that all reports on Norwegian affairs as well as the despatches connected therewith should be in Norwegian language (Article 33) The King was required to receive sufficient instruction in the Norwegian language * The official posts in the Norwegian State were open only to such Norwegian citizens as professed the evangelical Lutheran religion, swore fidelity to the King and the constitution and spoke the language of the country That provision was supplemented by another which laid down that those alone would be admitted to public employments who had permanent residence in the kingdom and were pledged to the independence of Norway In 1878 the following paragraph was incorporated in the constitution " Only such persons as profess the public religion of the State may be members of the King's Council

* Select Constitutions of the World p. 519

or fill judicial positions " (Article 92). Originally the law debarred the Jews from entering the kingdom of Norway This restriction was abolished in 1851 (Article 2). But it was made perfectly clear that no one except either a Norwegian or a Swede citizen could be appointed as "statholder."

The dissolution of the Union

Despite all these provisions the sources of friction between Sweden and Norway could not be wholly removed. The latter country was dissatisfied with the Union, particularly in regard to her external relations In 1891 she demanded a separate Consular Service Negotiations continued for fourteen years and ultimately broke down in 1905 when the Storthing passed a law establishing its own Consular Service The King vetoed the law and his action further embittered the relations between the two peoples. After months of negotiations, however, an agreement was arrived at and signed abolishing the union. On the 18th of November, 1905, the Norwegian constitution was amended and all reference to the union was omitted from the statute As a result many of the constitutional provisions which have been referred to above were then and subsequently repealed.

The Treaty of Vienna

But so far as international intervention is concerned, the starting point of our investigation is the Treaty of Vienna. About a month after the overthrow of Napoleon at Leipzig the Dutch rose up in rebellion at Amsterdam and subsequently at the Hague against foreign domination A declaration of independence was made and a provisional Government set up * The Prince who had been in exile for eighteen years came back, received the offer of Kingship by his motherland and accepted it under the title, William I. Powers were conferred upon him on condition that he would give the people a free constitution In accordance therewith he appointed a representative Commission to draw up the Fundamental Law The labours of the Commission were completed by February, 1814. The Fundamental Law as defined by them was accepted by an overwhelming majority of notables invited to decide on it. It included among other things provision for a representative assembly known

* Cambridge Modern History, Volume X, p 670.

as the States General for the purpose of protecting the rights and liberties of the people The judiciary was made completely independent and equal rights were guaranteed to members of different religious persuasions The Allied Powers welcomed the growth of this unified State under the sovereignty of the Prince of Orange In order that they might keep under check French ambitions in North-Western Europe they also conceived the plan of creating a larger union of the entire body of Low countries

The United Netherlands

Thus, the Treaty of Paris was made and signed by which Belgic Provinces were added to Holland, and as a result the United Netherlands came into being Catholic Belgium was united with Protestant Holland and hence arose the question of religious and racial protection Then at the Conference in London in June, 1814, the Allied Powers drew up what are known as the Eight Articles which were confirmed the same year at the Congress of Vienna and which the Prince of Orange, in his capacity as the sovereign of the United Netherlands, accepted The following provisions in the Eight Articles are important for our purpose

Provisions of the Treaty

I The union shall be intimate and complete and the united State shall be governed by the Fundamental Law already established in Holland guaranteeing religious protection which might be modified by mutual consent regard being had to the circumstances that might arise

II There shall be no change in those articles of the Fundamental Law which assure to all religious cults equal protection and privileges and guarantee the admissibility of all citizens whatever be their religious creed, to public offices and dignities

III The Belgian Provinces shall be in a fitting manner represented in the States General whose sittings in times of peace shall be held by turns in a Dutch and a Belgian town.

IV All the inhabitants of the Netherlands thus assured of equa constitutional rights shall have equal claim to all commercia and other rights without any hindrance or obstructio being imposed on any to the profit of others

V Immediately after the union the Provinces and towns o Belgium shall be admitted to the commerce and navigatio of the Colonies of Holland upon the same footing as the Dutcl Provinces and towns

The Congress of Vienna marks in a somewhat systematic form the beginning of international intervention in the domestic affairs of a Sovereign State. The Allied Powers explained in a subsequent Protocol the reasons for their action. They declared that they had had recourse to intervention in the interests of amalgamation necessitated by the circumstances of the case and that in respect of Belgium particularly, they had adopted the device by way of assertion of their right of conquest

Causes of friction Political and administrative inequalities

Neither the Fundamental Law, nor the Eight Articles, nor the Protocol could, as subsequent history shows, solve the difficulties For we find the Dutch and the Belgians differing in essential points on the questions of the representation of the two countries in the Second Chamber of the States General and of equal treatment of different religious beliefs in law. Equal representation of the two countries in the Chamber was ultimately provided for, but it was resented and opposed by Belgium on the ground that Holland with a much less population was not entitled to equal representation with Belgium The settlement did not last long And of the causes that contributed to its breakdown "political and administrative inequalities" and the linguistic difficulty were the most important Neither in the Fundamental Law nor in the Eight Articles was there any stipulation regarding the representation of the Belgians in Public Services and in the executive Government The disproportion of comparative figures, however, was marked and caused jealousy and irritation More difficult was the language question One of the greatest blunders of the Prince was to issue a decree legalising the use of French and Dutch ignoring altogether the claims of the Belgian tongue The crisis was soon reached when Dutch was declared the national language and its knowledge made a condition precedent to the admission to public employments

How subsequently the union broke off and Belgium seceded from it is for the historian to trace But for our purpose certain conclusions may be deduced from the settlement They are

Conclusions

I. The Allied Powers claimed and exercised the right of intervention in certain domestic matters of sovereign States *provided* the latter were

the result of fusion or amalgamation of different territorial units brought about by them, or at their instance, thus repudiating the Austinian theory of sovereignty

II No intervention was allowed in the affairs of large States

III The Powers seeking to intervene in the internal ad ministration of foreign States had no organisation, permanent or temporary, to enforce the terms of the Treaty imposed on the smaller States as they were jealous of one another and engrossed in their own affairs

IV Protection guaranteed in the Treaty applied only to religious beliefs and commercial activities and inter course The question of language did not arise at the Congress but it soon cropped up in the actual administration of the Fundamental Law *

Greece and the London Protocol.

From this singular instance of the Powers intervention in a State of Western Europe history takes us to Central and Eastern Europe, for centuries the hot-bed of international jealousy and intrigue and the plague spot of rivalry and everchanging territorial redistribution After years of conflict in which England took her due share a Protocol was signed in 1830 in London by Great Britain, France and Russia creating Greece into a Sovereign State and removing the control of the Porte over her The frontiers of Greece under the Protocol were much more contracted *vis-a vis* the territorial arrangements under a previous Protocol and only a fragment of Greece attained to independent statehood But what she lost in territory she gained in status For the purposes of religious

* Miss L. P Mair seems to overstate her case when she says that language had not the importance which it has at the present day because as we have seen the language question accelerated the crisis in the United Netherlands (Miss Mair: The Protection of Minorities p. 80.)

protection the Allied Powers provided the following article in the Protocol:

"The plenipotentiaries of the three Allied Courts being desirous of giving to Greece a new proof of the benevolent anxiety of their Sovereigns respecting it and of preserving that country from the calamities which the rivalries of the religions therein professed might excite, agreed that all the subjects of the new State, *whatever may be their religion*, shall be admissible to all public employments, functions and honours, and be treated on the footing of perfect equality, without regard to difference of creed in all their relations, civil or political"

Cession of the Ionion Islands

When again in 1863 the Ionian Islands were made over to Greece in a Treaty signed by Great Britain, France, Russia and Denmark, the principle embodied in the *London Protocol of 1830* was reaffirmed in the following words.

"The principle of entire Civil and Political equality between subjects belonging to different creeds, established in Greece by the Protocol (of the 3rd February, 1830) shall be likewise in force in the Ionian Islands."

Thessally and Protection for Musalmans

The question was once again and for the third time raised in 1881 when Greece gained a further accession of territory by getting Thesally The cession was recognised in a Treaty to which Great Britain, France, Austria, Germany, Italy and Russia, were parties. Among other things the Treaty provided:

I The lives, property, honour, religion and custom of those of the inhabitants of the localities ceded to Greece who shall remain under the Hellenic administration will be scrupulously respected They will enjoy the same civil and political rights as subjects of Hellenic origin (Art III)

II Freedom of religion and public worship is secured to Musalmans in the territories ceded to Greece (Art VIII)

III No interference shall take place with the autonomy or hierarchical organisation of Muslim religious bodies now existing or which may hereafter be formed, nor with the management of the funds and real property belonging to them (Art VIII)

IV No obstacle shall be placed in the way of the relations of these bodies with their religious heads in matters of religion (Art. VIII)

The principles of religious protection applied in the case of the territories ceded to Greece were accepted also for Moldavia and Wallachia at the Conference of Constantinople in 1856 when they were declared autonomous Principalities Provisions made in the Protocol were supplemented two years later in 1858 when the Convention of Paris laid down the constitution of the Principalities The terms of the Protocol read with the provisions incorporated in the constitution give a full picture of the nature and extent of protection of the minorities These applied not only to differences of religion as in the previous Treaties but to those of race also Besides in a more definite and specific form something like the Rule of Law was introduced for in guaranteeing personal liberty the contracting parties used expressions which are familiar to students of English constitutional history and constitutional law * But special care was taken at the same time to distinguish nationals from persons under foreign protection who were excluded from political rights and privileges Safeguards were also provided against commercial discrimination and expropriation For the first time perhaps one comes across in an international instrument an indignant protest against trade monopolies Nor is this all It was stipulated that steps would be taken to change the agrarian law with a view to improve the conditions of the tillers of the soil thus anticipating modern tendencies in land legislation

Moldavia and Wallachia: The principle of protection extended Fundamental Rights and safeguards against commercial monopolies

In the protocol of 1856 we find the following provisions

I All religions and those who profess them shall enjoy equal liberty and equal protection in the two principalities (Art XIII)

II All Moldavians and all Wallachians will without exception be admissible to public employment (Art XVI)

III All classes of the population without any distinction of birth or religion shall enjoy equality of civil rights and in particular the right of property in all its forms but the exercise of the political rights shall be suspended for those inhabitants who are placed under foreign protection. (Art XVIII)

* Cf Art. 46 of the constitution as agreed upon at the Convention of Paris 1858.

The provisions made in the constitution for the two Principalities in 1858 read as follows ·

I Moldavians and Wallachians shall be equal before the law in matters of taxation and equally admissible to public employments in both principalities

II Their individual liberty shall be guaranteed No one shall be detained, arrested or prosecuted, except in accordance with law

III No one shall be deprived of his property except in accordance with law, or on the ground of public interest and after receiving an indemnity

IV Moldavians and Wallachians observing Christian rites shall equally enjoy political rights The enjoyment of those rights may be extended to other religions by a legislative enactment

V All privileges, commerce or monopolies enjoyed by certain classes shall be abolished There shall be undertaken without delay revision of the law which regulates the rights of the proprietors of the land with a view to improving the condition of the peasant

Protection optional for non Christians

It will be apparent from the decision taken at the Paris convention that although ample safeguards had been provided for the minorities, there were no provisions for linguistic and educational facilities and that religious protection was obligatory so far as the Christians were concerned and practically optional in the case of non-Christians

The Treaties of San Stephano and Berlin

By far the most famous Treaty in this connection is the Treaty of Berlin signed in July, 1878 The signatories of the Treaty were Great Britain, France, Germany, Austria, Italy, Russia and Turkey It contained sixty-four articles and has been described by R W Mowatt* as one which " is for South Eastern Europe what the great Treaty of Vienna of 1815 was for the West ; and for thirty years its territorial arrangements received comparatively small modifications " It was preceded by the Treaty of San Stephano† agreed upon and signed by Turkey and Russia The Treaty was not welcomed by the great Powers of Europe The constitution of a big Bulgaria

* R W Mowatt Select Treaties and Documents (Introduction XL-XLIII)
† Hertslet IV No 518

was looked upon by Austria as a menace, and Great Britain was naturally suspicious of the extension of Russian influence in Constantinople and Asia Minor A little over a month before the Congress of Berlin, to be precise, on the 4th of June, 1878, Great Britain and Turkey entered into an alliance Great Britain agreed to stop Russian incursion into Turkey s territory in Asia Turkey was called upon, and she promised, to give protection and good government to her Christian subjects Cyprus was " assigned to be occupied and administered by England," Turkey reserving to herself certain specified rights only

The Sultan s gestures to Crete the principle of communal representation in the Administrative Council accepted

The first act of the Congress of Berlin was to reject the terms of settlement arrived at under the Treaty of San Stephano The dream of a big Bulgaria was smashed and in its place a small Principality was created between the Danube and the Balkans which became a tributary of the Sultan * Eastern Roumelia was converted into a province within the Sultan's Empire but placed under a Christian Governor-General Crete was to continue under Turkey but the Sultan promised to govern it according to the Organic or Fundamental law or the Firman of 1868 by which he guaranteed equal fiscal treatment to his Christian and Mahommedan subjects alike and provided for the representation of Christians on the Administrative Council of the Island † It was further stipulated that in other European possessions of Turkey similar laws would prevail ‡ and the Sublime Porte was made to undertake to " depute special Commissions in which the native element shall be largely represented, to settle the details of the new laws in each province Further, it was laid down that the schemes of organisation resulting from these labours shall be submitted for examination to the Sublime Porte which before promulgating the Acts for putting them into force shall consult the European Commission instituted for Eastern Roumelia " Equal fiscal treatment was of course no innovation in Europe but the principle of representation of the minorities in the Administrative

* Art I.
† Hertslet IV Appendix 8229
‡ Art. 23.

Council was perhaps accepted for the first time in a European Treaty.

Roumania's status conditional upon her acceptance of minorities safeguards

The declaration of Servia, Roumania and Montenegro as autonomous States and of Bulgaria as an independent Principality constituted the greatest political change effected under the Treaty of Berlin. The autonomous and independent status of Roumania was made conditional upon the acceptance by her of the following terms :

I In Roumania the difference of religious creeds and confessions shall not be alleged against any person as a ground for exclusion or incapacity in matters relating to the enjoyment of civil and political rights, admission to public employments, functions and honours, or the exercise of the various professions and industries in any locality whatsoever *

II The freedom and outward exercise of all forms of worship shall be assured to all persons belonging to the Roumanian State as well as to foreigners, and no hindrance shall be offered either to the hierarchical organisations of the different communions or to the relations with their spiritual chiefs

III The subjects and citizens of all the Powers, traders or others, shall be treated in Roumania without distinction of creed, on a footing of equality

IV No transit duties shall be levied in Roumania on goods passing through the Principality

The articles are peculiar in that Roumania was admitted only to conditional sovereignty as she had no right to regulate her own tariff policy and to define and promulgate her own law of nationality thereby depriving her of powers which characterise a sovereign and independent State. The Government of Roumania had no right to discriminate between foreigners and their own citizens.

The independence of Servia was recognised subject to the following conditions :

Safeguards for the minorities in Servia

I In Servia the difference of religious creeds and confessions shall not be alleged against any persons as a ground for exclusion or incapacity in matters relating to the enjoyment of civil and political rights, admission

* Article XLIV

to public employments functions and honours or the exercise of various professions and industries in any locality whatsoever *

II The freedom and outward exercise of all forms of worship shall be assured to all persons belonging to Servia as well as to foreigners and no hindrance shall be offered either to the hierarchical organisations of the different communions or to their relations with their spiritual chiefs

There is little difference between the treatment accorded to Servia and that accorded to Roumania Identical provisions are also made in the case of Montenegro The case of Bulgaria has been previously discussed at some length

No international Treaty in Sultan's case: a mere declaration considered adequate.

With reference to Turkey it has been shown how she undertook to safeguard the interests of her Christian subjects in various parts of Europe and how Crete was treated under the Treaty of Berlin In the Congress of Paris, 1856, the question of the protection of her minorities was discussed But the Sultan did not consider himself bound, like the newly created States, by international agreements He only communicated his desire to follow the principles broadly laid down and his communication addressed to the Powers could not be interpreted as having given the latter the right to intervene, separately or in concert, in the domestic affairs of the Sultan In 1878 also no international settlement was imposed upon him, but he was somehow prevailed upon to make a declaration of his intention of which the European Powers took note under the Treaty of Berlin †

The Sultan's declaration more comprehensive than international Treaties.

The contents of his declaration were, in many respects, more extensive than the obligations imposed under the Treaty upon the minor Christian States The Sultan made announcement of his policy to the following effect ‡

I. In no part of the Ottoman Empire shall difference of religion be alleged against any person as a ground for exclusion or

* Art. 35

† Art LXII.

‡ Art LXII. (Mowatt: Select Treaties and Documents.)

incapacity as regards the discharge of civil and political rights, admission to public employments, functions and honours or the exercise of the various professions and industries

II All persons shall be admitted, without distinction of religion, to give evidence before the tribunals

III The freedom and outward exercise of all forms of worship are assured to all, and no hindrance shall be offered either to the hierarchical organisations of the various communions or to the relations with their spiritual chiefs

IV Ecclesiastics, pilgrims and monks of all nationalities travelling in Turkey in Europe, or Turkey in Asia, shall enjoy the same rights, advantages and privileges

V The right of official protection by the diplomatic and consular agents of the Powers in Turkey is recognised both as regards the above-mentioned persons and their religious, charitable and other establishments in the Holy places and elsewhere

VI The rights possessed by France are expressly reserved and it is well understood that no alterations can be made in the *status quo* in the Holy places

VII The monks of Mount Athos, of whatever country they may be natives, shall be maintained in their former possessions and advantages, and shall enjoy, without any exception, complete equality of rights and prerogatives

The features of the European Polity

A careful examination of the Treaties and Protocols brings us face to face with certain features of the European system of polity of that time Eastern Europe had not yet settled down and territorial redistribution and creation of new States were going on at rapid intervals. It seems to have been accepted as a settled fact that the reconstruction of Eastern Europe was the concern of the Great Powers The Powers themselves, for reasons domestic or otherwise, largely helped to create new States in Eastern Europe and as a result the recognition by the Powers of those States was considered necessary in the circumstances of the times The Powers acted more or less like the concert of Europe and constituted themselves into the only competent Court, as it were, for "dealing with all matters of European concern" The principle was laid down that the sovereignty of new States would not be recognised unless, paradoxical though it may sound, they accepted certain obligations in

respect of the protection of minorities imposed upon them by the Powers The right to intervene was claimed and exercised by the latter and the States affected quietly submitted to it

Discrimination between Eastern and Western Europe.

An entirely different procedure, however, was followed consistently in Western Europe with the single exception of the *United Netherlands* The question of international interference, for example, did not arise and was not even thought of when the Kingdom of Italy was formed or when the German Empire was built up by territorial changes and conglomerations Temperley* seems to justify this differential treatment on the ground that the Western States had already a well-developed system of personal rights guaranteeing freedom of worship to all communities and sects This distinction between Eastern and Western Europe, we are told, was based on a real difference between the characters of the peoples and the political situation It is, however, clear that the Powers made the subject of minorities protection their common concern when at their instance territorial changes were effected resulting in political re-distribution of peoples and races The Powers thought that they owed it to the minorities placed under the suzerainty of a different race professing a different religion to give the transferred races or peoples adequate protection against majority rule Temperley's *justification of differential treatment* as between one part of Europe and another is not sufficient in view of the fact that it led to suspicion and mistrust in European politics—a point which as we shall see later was emphasised by Professor Gilbert Murray in connection with the subsequent League settlements

Extension of the principle of protection.

It appears that the sphere of protection extended from time to time so that racial differences came to be recognised as being entitled to protection as differences in religious persuasions In some of the subsequent Treaties foreigners were admitted to political and civil rights and religious groups were assured that no hindrance would be placed in their relations with their spiritual chiefs no matter where the

* Temperley H. W V: A History of the Peace Conference of Paris Vol. V pp 116-117.

latter came from It will be seen that the refusal on the part of the Great Powers, in the Minorities Treaties under the League, to make provision for international relations in religious matters, provoked strong and bitter opposition from some of the States concerned. There is another point to be borne in mind In the earlier settlements, as Temperley shows, the minorities rights had been conferred upon members of certain Christian confessions and actual protection by way of interference placed under a single Power. France, for example, was chosen the guardian of the Catholics and Russia of the orthodox sect inhabiting Sultan's territory. In the Treaties of Paris and Berlin protection had the guarantee from all the Powers and was extended to peoples other than the Christians such as the Mahommedans and the Jews

Grievances of the Jews and the Powers' inability to redress them

There were no complaints received regarding the infringement of the protection clauses from either the Mahomedans or the Christians But it seems that the Jews in Roumania did not receive the treatment which had been assured to them, particularly under Art. XLV of the Berlin Treaty of 1878, and to which they were entitled They did not acquire the nationality of Roumania automatically; a special law was promulgated and imposed for the purpose and the cumbrous and difficult process rendered the provision practically null and void * But the Powers were unable to do anything, first, because owing to political differences among themselves they could not hit upon a common line of action, secondly, because they had no machinery, permanent or temporary, of enquiry, adjudication and control, and thirdly and lastly, because the aggrieved peoples had no means of ventilating their grievances The principle of protection of minorities was accepted and, in many cases, acted upon The principle of international intervention was also recognised in the Treaties and

* The constitution of 1866, as amended in October, 1879, in accordance with the Treaty of Berlin, 1878, provided that a foreigner whatever his religion, could be naturalised only upon compliance with certain conditions The naturalisation law was aimed at the Jews who experienced great difficulties in being admitted to Roumanian citizenship The long-standing difficulty, as we shall see later, was removed by Art 7 of the Roumanian Treaty under which Roumania has undertaken to recognise as Roumanian nationals *ipso facto* and without any requirement of formality Jews inhabiting any Roumanian territory.

Protocols in the event of any infraction of the provisions contained therein For reasons already stated, however, the Powers could not create an actual precedent in regard to international supervision Indeed we find not a single instance showing that the Powers acted jointly or severally to protect minorities in any of the newly created States or in Turkey

The Treaty of Bucharest 1913 minor States seek to decide their own problems.

The history of the problem now brings us to the year 1912 when the Balkan wars were fought In those wars the great Powers took no part The territorial changes under which Serbia and Greece gained large accessions were not effected with their sanction The settlement arrived at under the Treaty of Bucharest, 1913 was not the concern of Western Europe Neither, therefore at the Conference of London nor at the Conference of Bucharest where the territorial changes were discussed at length, was the intervention of the Great Powers sought The step taken seems to have constituted a reply to the earlier Treaties agreed upon at their instance and imposed by them upon small and minor States, and it was an attempt to demonstrate that the great Powers had no business to intervene in the domestic affairs of the minor States in Eastern Europe

America appears on the scene provisions made for minorities protection.

But at the Conference of Bucharest a note from the United States Government was received requesting the parties concerned to agree by adequate provisions to guarantee the protection of minorities transferred from one State to another For the first time therefore America sought to make her influence felt in the internal arrangements in the Balkans The document was taken due note of by the insertion thereof in the Protocols of the Conference but it was not incorporated in the Treaty inasmuch as it was considered unnecessary and superfluous Greece and Bulgaria however, wanted a much more restricted clause to form part of the Treaty providing for religious autonomy and liberty of the schools The proposal was turned down by Serbia although ultimately the States agreed to confer certain rights on the Kutso-Vlachs In the Treaty signed by Turkey and Serbia the latter of which gained new territories, religious freedom was assured to the

Mahommedan subjects of Serbia and free intercourse with their religious heads, and equal civil and political rights with the Serbian nationals were also promised. But it was a matter entirely between Turkey and Serbia and there was in the Treaty not the slightest suggestion of foreign interference

The validity of the Treaty of Bucharest challenged

The matter did not rest there. The provisions of the famous Congress of Berlin did yet stand. In international law no settlement was considered valid unless the Great Powers who had signed the Berlin Treaty accorded it their sanction Some such recognition was considered essential, for the principle established for more than a century could not be violated by small nations by means of an arrangement among themselves The Jewish Committee representing as they did a "wandering race" with no permanent homeland appear to have been alarmed and took the earliest opportunity of addressing the British Government on the subject of their protection in the Balkan States. The British Government took the view, as would be clear from the two letters issued from the Foreign Office, that no political re-distribution was valid except with their approval. The following letters were addressed to the Jewish Committee at the instance of Sir Edward (afterwards Lord) Grey, His Majesty's Secretary of State for Foreign Affairs.

FOREIGN OFFICE,
October 29th, 1914

Gentlemen,

I am directed by Secretary Sir E Grey to acknowledge the receipt of your letter of October 13th and to observe in reply that the articles of the Treaty of Berlin, to which you refer, are in no way abrogated by the territorial changes in the near East, and remain as binding as they have been hitherto as regards all territories covered by those articles at the time the Treaty was signed

His Majesty's Government will, however, consult with the other Powers as to the policy of re-affirming in some way the provisions of the Treaty of Berlin for the protection of the religious and other liberties of minorities in the territories referred to, when the question of giving formal

recognition by the Powers to the recent territorial changes in the Balkan Peninsula is raised

I am
Gentlemen
Your most obedient humble servant
EYRE A CREW

Again in the next year the same gentleman wrote

FOREIGN OFFICE
October 29th 1913

Gentlemen,

I am directed by Secretary Sir E Grey to inform you that he has given his careful consideration to your letter of the 14th instant on the subject of the rights of native Jews in Roumania

I am to observe in reply that the questions arising under the Convention of Paris of 1858 and the Treaty of Berlin being as you rightly point out matters of European concern it is for the signatory Powers of those instruments to deal collectively with any infractions or alleged infractions of their terms by particular States

I am however to add that Sir E Grey will bear in mind the arguments and suggestions contained in your letter when the moment arrives for His Majesty s Government definitely to recognise the recent annexations of territories by the Balkan States.

Miss Mair points out that the Balkan States accordingly felt that they had cast off the tutelage of the Powers and could in future do what they liked with their own, and when the minority provisions of the Peace Treaties were under discussion they protested strongly against what they considered the coercion of the smaller Powers by the great and especially against the imposition on the smaller States of obligations which the Great Powers would not themselves undertake * That such a feeling was cherished by the Balkan States is definitely clear but it is not certain whether at that time they could claim immunity from interference by the Great Powers The issue raised could not be put beyond doubt as in the midst of this controversy the sound of the battle was heard and the whole world was involved in one of the greatest Wars in all history

The issue not decided.

* L. P Mair : The Protection of Minorities p. 34

CHAPTER III

MINORITIES TREATIES.

General Observations.

Results of the European War the political map of Europe re drawn and consequent changes in the nationality of peoples

The principle of international intervention in minor States having within themselves racial, religious and linguistic minorities had, as we have seen, already been established at the Congress of Vienna, 1814, and at the Congress of Berlin, 1878, and also in the Treaties contracted during the period from 1814 to 1878 It was, however, sought to be nullified by the Balkan States in 1913 when at the instance of the Jewish Committee the British Foreign Office raised its voice of protest But after the great European war the problem appeared in a more acute and decisive form, the reason being that in no period of modern history had the territorial changes effected been so great and so revolutionary and changes in the nationality of peoples so drastic As Masaryk has observed, the " War set up a new order in Europe, in Central Europe particularly Seven new or reborn States may be reckoned Finland, Esthonia, Latvia, Lithuania, Poland, Danzig and Czechoslovakia Changes occurred in six older or existing States Germany lost her non-German regions (with the exception of Lusatia), France regained Alsace and Lorraine; Belgium got a bit of the Rhineland, to Italy were added parts of what had been Austria, Bulgaria lost territory on the Aegean, Denmark recovered some Danish districts from Germany, Albania was delimited anew; six States were radically transformed—Austria, Hungary, Yugo-Slavia, Roumania, Greece and Turkey The changes ,"

* T G Masaryk The Making of a State, Chapter X

as we find in a book issued by the League of Nations Secretariat, resulted in a change of nationality of many peoples "*

The question of protection raised before the League.

At the end of April, 1919, the American and Polish delegates brought the question of minorities protection before the Supreme Council of the League of Nations which referred it to a special Minorities Committee The matter was taken up and pressed also by the Economic Section of the British Delegation which made it clear that before the Treaties of Peace were signed it was necessary to impose by separate instruments or documents certain political and economic obligations towards the Allies and the enemy States on the newly created States and ceded territories The Minorities Committee to which the subject was referred for examination first received representations from the United States Great Britain and France and subsequently from Italy and Japan The necessity for the League s intervention in the interests of the minorities was felt also because of the alarm raised by the Jewish race The Jewish Societies in Great Britain and America had long been in communication with their respective Governments on the subject Reference has already been made to the American note addressed to the Balkan States when they met to discuss the provisions of the treaty of Bucharest and also to the letters addressed to the Jewish Committee by the British Foreign Secretary of State in reply to their communications At Paris the important Jewish societies were represented by their delegates to watch over their interests They were specially interested in Poland and Roumania in each of which there was a large Jewish population who had tales of suffering and humiliation to tell The Conference therefore felt called upon to give them a sense of security by assuring them necessary protection by the League

The first Treaty of Peace signed was that with Germany and before the signatures were appended to the Treaty it was considered essential that something should be done to emphasise the necessity of the Powers intervention for the protection of the Polish nationals who represented a racial minority for Poland was created out of large accessions of territory from Germany The

* Ten Years of World Co-operation p. 354

following clause* was therefore inserted in the Treaty with Germany:

The Treaty with Germany and Poland's undertaking

"Poland accepts and agrees to embody in a Treaty with the principal Allied and Associated Powers such provisions as may be deemed necessary by the said Powers to protect the interests of the inhabitants of Poland who differ from the majority of the population in race, language or religion

Poland further accepts and agrees to embody in a Treaty with the said Powers such provisions as they deem necessary to protect freedom of transit and equitable treatment of the commerce of other nations"

The Polish Treaty signed it serves as the model

The ground was prepared and the foundations thus laid for the League's intervention in the interests of minorities; and a few weeks were taken to come to a general agreement regarding minorities protection, first, among the Allied and Associated Powers themselves and then between them, on the one hand, and the Polish Government, on the other On the 4th of May, 1919, a draft Treaty with Poland was submitted to the Council of Four and it was later communicated both to the Polish delegation at the Conference and to the Polish Government All the issues raised in connection with the protection of minorities were discussed at considerable length when the Polish Treaty was drafted The Treaties with other new States were practically and in essential points based on the Polish model

The position of Czecho-Slovakia and Finland considered

It may be mentioned in this connection that the Minorities Committee had originally been appointed to deal with Poland and the other newly created States As a result, therefore, the Committee had to take up the case of Czecho-Slovakia, a State formed at that time, and provisions for the protection of her minorities were made in a separate Treaty when the Treaty of Austria otherwise known as the Treaty of St Germain-en-Laye was signed, for the obvious reason that Czecho-Slovakia had been created out of dismemberment of Austria-Hungary.

* Clause 93 of the Peace Treaty with Germany

Barring Poland and Czecho-Slovakia and Finland no other new States were formed at that time It must, however, be remembered that Finland was not treated like Poland or Czecho-Slovakia The reason is that her territories had formally formed part of Russia and that inasmuch as Russia was yet outside the range of an international agreement or Treaty no minorities Treaty could be imposed upon Finland without defining the frontiers between Finland and Russia

The principle of minorities protection extended to three other States how the step taken is justified.

In strict law the Allied and Associated Powers had by the declaration previously made forfeited any claim to intervene in the affairs of other States But the Minorities Committee did not leave the matter there At the beginning of May 1919 the Council of Four decided on their recommendation to extend the principle of protection to three other States in South Eastern Europe which as a result of the War and at the instance of the Allied and Associated Powers had received large accessions of territory These States were Serbia Greece and Roumania The instructions with which the Minorities Committee had been originally charged were not carefully worded and if the principle of intervention could be accepted in the case of Poland and Czecho-Slovakia there was no reason why it should not be applied to States to which not only vast territories were ceded but to which large masses of peoples alien in race religion and language were handed over In 1912 for example Serbia was a small principality with a population of three millions who with the exception of a certain number of Roumanians in the Timok belonged to the same race professed the same religion and spoke the same language After the Balkan settlemen[illegible]o received large territories on the Albanian frontier and also Macedonia which had for generations been the site of a most acute racial conflict where Greeks Serbs and Bulgarians were inextricably mingled * After the great War the whole of Bosnia Herzegovina Croatia Dalmatia and considerable parts of Slovenia were added to the small kingdom raising the total population from three millions to twelve

* Temperley : A History of the Peace Conference V p. 127

millions or more. So great was the change that the name had to be changed and in subsequent papers and documents Serbia came to be described as the Kingdom of the Serbs, Croats and Slovenes. In Roumania also there were important changes The population, for one thing, was doubled. The new districts placed at her disposal a million of human souls who were Magyar in speech and a considerable number of German-Saxons Besides, the old difficulties with regard to the Jewish community were complicated by the transfer of Bukovina which was fifty per cent a Jewish territory. Greece also presented a similarly delicate and complex problem on account of the transfer to her of large foreign populations It is clear, therefore, that despite the loose wording of the instructions issued to the Minorities Committee the extension of the principle of protection to these States was justified.

Western Europe accepts no obligations protests in influential circles

But care was taken not to apply the principle to the States in Western Europe (Italy or France, for example) which gained considerable territories as a result of the war Here we are confronted with Temperley's argument that Western Europe required no minorities clauses because, in his view, she had already developed higher and more civilised notions of law and government History has disposed of the argument in a convincing manner and Italy has proved that Temperley was not absolutely correct in his estimate of the political sense and judgment of Western Europe The policy of differential treatment as between Eastern and Western Europe adopted by the Conference was carried to such an extent that while in the new Slav States the German minorities were sought to be protected in every possible manner, the Slav minorities in Germany were left completely alone Again the anxiety shown by the Great Powers was not for the minorities of the world in general but only for those minorities who by accident became the nationals of newly established States of Central and Eastern Europe For had not the Principal Allied and Associated Powers—each one of them—minority problems of their own? To give one example, the Peace Treaties gave Italy a large German and Slav population " which by every repressive power it can command, it is trying to Italianise."

Professor Gilbert Murray is right when he says that it was an error of principle in the Peace Treaties to impose the clauses for the due protection of minorities upon the new nations alone The same obligations should have been accepted by the Great Powers and made part of the common law of Europe * The same view has been taken by the Labour leader and sometime Prime Minister of the National Government in England It is a great misfortune, observes Mr Ramsay MacDonald, that the powers given to the League to observe the obligations of States to minorities did not apply to old States like Italy and that such as they were, they have been weakened in practice That should be ended at once and an effective League supervision should be restored †

The minor States indignant at differential treatment an attempt to humiliate them.

The new States in the circumstances do not consider the protection of minorities as an obvious legal and constitutional duty on their part They regard the Minorities Treaties as an ingenious device to impose restrictions upon their sovereignty It is not therefore without reason that at the first session of the Congress at Geneva of the representatives of the minorities of the world a Petition of Rights was drawn up asking for adequate protection of the minorities in all parts of the world Of course it is true that most of the rights demanded had already been provided in the *Minorities Treaties but a resolution in accordance with the* spirit of the Petition was adopted as the Congress included representatives from the minorities in Germany Spain Denmark and Italy, in which no such provisions had been made There was, however an attempt made in 1922 at the League Assembly to remedy the outstanding defect of the Minorities Treaties Dr Walters, the Latvian representative suggested that uniform law on the basis of the Minorities Treaties should be adopted for all States M Erich representing the Finnish Government proposed that the Assembly should ask the Council to set up a Commission to study the question of the protection of minorities in general, the Esthonian representative supporting the proposal But it was

* Gilbert Murray's Introduction to Miss Mair's Protection of Minorities p vii.
† The Sunday Times.

minorities proposed to be transferred to his State The intention of the Supreme Council as then disclosed was greeted with suspicion and disapprobation by the smaller Powers affected by the proposed arrangement An agitation was started The movement of opposition was set on foot And at the plenary session of the Conference which began on the 29th of May called for the purpose of considering the text of the Austrian Treaty M Bratianu led the opposition against the contemplated interference by the Great Powers He made it clear in a speech remarkable for force of expression and cogency of argument that he was prepared to accept obligations in matters of minorities protection along with all the States constituting the League of Nations There was no reason he argued why interference by the League should be restricted to the minor States He looked at the proposal as an attempt to attack and assail their national independence which had no meaning without State sovereignty The Council disposed of the Roumanian Prime Minister s case by stating that it did not claim to lay down principles of government for all the States of the world What it was anxious to do was to deal with certain specific cases which had arisen as a result of territorial re-distribution of Europe to which the Allied and Associated Powers had been a party The Council added that the frontiers had been determined by the Great Powers and that they had thus taken upon themselves a responsibility towards the transferred minorities from which they could not absolve themselves The Roumanian Prime Minister s protest proved to be a cry in the wilderness

President Wilson explains the position of the Allies.

The position of the Allies was explained by President Wilson in the course of his speech made on the 31st of May 1919 President Wilson said among other things

> Take the rights of minorities Nothing I venture to say is more likely to disturb the peace of the world than the treatment which might in certain circumstances be meted out to minorities And therefore if the great Powers are to guarantee the peace of the world in any sense is it unjust that they should be satisfied that proper and necessary guarantee has been given?

"I beg our friends from Roumania and Serbia to remember that while Roumania and Serbia are ancient sovereignties the settlements of this Conference are adding greatly to their territories You cannot in one part of our transactions treat Serbia alone and in all of the other parts treat the kingdom of the Serbs, the Croats and Slovenes as a different entity, for they are seeking the recognition of this Conference as a single entity, and if this Conference is going to recognise these various Powers as new sovereignties within definite territories, the chief guarantors are entitled to be satisfied that the territorial settlements are of a character to be permanent, and that the guarantees given are of a character to ensure the peace of the world

"It is not, therefore, the interventions of those who would interfere but the action of those who would help I beg that our friends will take that view of it, because I see no escape from that view of it In these circumstances, is it unreasonable that the United States should insist upon being satisfied that the settlements are correct? Observe M Bratianu—and I speak of his suggestions with the utmost respect—suggested that we could not, so to say, invade the sovereignty of Roumania, an ancient sovereignty and make certain prescriptions with regard to the rights of minorities But I beg him to observe that he is overlooking the fact that he is asking the sanction of the Allied and Associated Powers for great additions of territory which come to Roumania by the common victory of arms, and that, therefore, we are entitled to say 'If we agree to these additions of territory we have the right to insist upon certain guarantees of peace'" *

The arguments in favour of discrimination not convincing

President Wilson was a messenger of peace at the Peace Conference at Paris His was a strenuous and fervent plea for amity and good-will among the war-weary nations of the world. But it is difficult to reconcile his appeal with the observations that he is reported to have made in connection with the protection of minorities in the small and newly created States That the War was won by the ceaseless efforts of the Allied and Associated Powers admits of little doubt. That they created the new States and made large additions of

* The speech was issued from the White House, 11th October, 1920, being the shorthand notes of the President's stenographer on 31st May, 1919

territory to a number of old States is substantially true That the transferred minorities who were seized with panic in view of their past history and the present position required some kind of safeguards is also true That elements of disturbance and discord should be removed as an essential condition of permanent peace of the world and internal security of the States concerned is further more recognised But the well meaning President did not stop there He claimed practically supervision of the Great Powers acting in concert over the smaller States as growing out of the right of conquest He claimed on behalf of the Allied and Associated Powers the right to interfere with the internal affairs of the new States because they owed their existence to the work of the Allies on the frontiers and in the field of battle If it was really a peace move inspired by the highest of motives then a similar policy ought to have been adopted at the Conference with regard to all the States which had minority populations within their borders The smaller nations in such a case ought not to have been given the impression that their legal and international status was not on a footing of equality with that of the Allied and Associated Powers It was by no means a stroke of statesmanship on the part of President Wilson to create conditions in European politics under which the minor States were led to suffer from an inferiority complex and an acute sense of grievance But the latter had to bow down to the inevitable and the doctrine that might is right triumphed Not only Poland and Czecho-Slovakia but also the older Balkan States had to submit to the principle of international intervention enunciated by President Wilson on behalf of the Supreme Council Having laid down the general formula of intervention the Council proceeded to consider the provisions of the Polish Treaty An emphatic protest was placed on record by M Paderewski the Polish representative at the Conference In a memorandum submitted by the Polish delegation it was pointed out that the Treaty of Versailles did not contain any provisions regarding the protection of minorities in Germany analogous to those which Poland was required to accept under Article 93 of the German Treaty for the protection of the German minorities in Poland As a result of negotiations between the delegation, the minorities Committee and the

Supreme Council, some modification of the original draft of the Treaty was made,* but the fundamental principle remained intact

The amended Treaty was then sent on the 24th of June, 1919, to M Paderewski with a covering letter from M Clemenceau, President of the Peace Conference, explaining in some detail the motive and purpose underlying the Treaty In his letter the President wrote.

M Clemenceau's analysis of the Treaty, the case for intervention explained

"I would point out that this Treaty does not constitute any fresh departure It has for long been the established procedure of the public law of Europe that, when a State is created, or even when large accessions of territory are made to an established State, the first and formal recognition by the Great Powers should be accompanied by the requirement that such State should, in the form of a binding international convention, undertake to comply with certain principles of government This principle, for which there are numerous other precedents, received the most explicit sanction when at the last great Assembly of the European Powers—the Congress of Berlin—the sovereignty and independence of Serbia, Montenegro and Roumania were recognised

"The principal Allied and Associated Powers are of opinion that they would be false to the responsibility which rests upon them if on this occasion they departed from what has become an established tradition In this connection I must also remind you that it is to the endeavours and sacrifices of the Powers in whose name I am addressing you that the Polish nation owes the recovery of its independence It is by their decision that Polish sovereignty is being re-established over the territories in question and that the inhabitants of these territories are being incorporated in the Polish nation It is on the strength which the resources of these Powers will afford to the League of Nations that, for the future, Poland will to a large extent depend for the secure possession of these territories There rests, therefore, upon these Powers an obligation,

* Germany stated that for her part she was prepared to apply the principles of protection to the minorities within her own territory In the Allies' note, dated June 16th, 1919, reference was made to the guarantees assured to German minorities in the ceded territories, and the Allied and Associated Powers took note of the declaration made by the German delegation.

which they cannot evade to secure in the most lasting and solemn form guarantees for certain essential rights which will afford to the inhabitants the necessary protection whatever changes may take place in the internal constitution of the Polish State

It is in accordance with this obligation that clause 93 was inserted in the Peace Treaty with Germany This clause relates only to Poland but a similar clause applies the same principles to Czecho-Slovakia and other clauses of the same nature have been inserted in the Treaty of Peace with Austria and will be inserted in those with Hungary and with Bulgaria under which similar obligations will be undertaken by other States which under those Treaties receive large accessions of territory

It is indeed true that the new Treaty differs in form from earlier conventions dealing with similar matters The change of form is a necessary consequence and an essential part of the new system of international relation which is now being built up by the establishment of the League of Nations Under the older system the guarantee for the execution of similar provisions was vested in the Great Powers Experience has shown that this was in practice ineffective and it was also open to the criticism that it might give to the Great Powers either individually or in combination a right to interfere in the internal constitution of the States affected which could be used for political purposes Under the new system the guarantee is entrusted to the League of Nations The clauses dealing with this guarantee have been carefully drafted so as to make it clear that Poland will not be in any way under the tutelage of those Powers which are signatories to the Treaty

I should desire moreover to point out to you that provisions have been inserted in the Treaty by which disputes arising out of its provisions may be brought before the Court of the League of Nations In this way differences which might arise will be removed from the political sphere and placed in the hands of a Judicial Court and it is hoped that thereby an impartial decision will be facilitated while at the same time any danger of political interference by the Powers in the internal affairs of Poland will be avoided

The situation with which the Powers have now to deal is new And experience has shown that new provisions are necessary The territories now being transferred both to Poland and to other States inevitably include a large population speaking languages and belonging to races different from that of the people with

whom they will be incorporated Unfortunately, the races have been estranged by long years of bitter hostilities It is believed that these populations will be more easily reconciled to their new position if they know that from the very beginning they have assured protection and adequate guarantees against any danger of unjust treatment or oppression The very knowledge that these guarantees exist will, it is hoped, materially help the reconciliation which all desire, and will indeed do much to prevent the necessity for their enforcement "*

No innovation in principle

M Clemenceau was a far more practical and thorough-going politician than the distinguished American Professor and statesman who was an idealist The former went straight to the problem with which he was confronted without indulging in prefatory platitudes He spoke like a lawyer and as one who meant business The Polish representative was told straight away that in imposing the Minorities Treaty upon his country the Allied and Associated Powers were simply following the precedents already established in the public law of Europe It had been the practice among European nations, the French Premier pointed out, that the smaller nations which owed their existence to the Great Powers had to accept obligations of minorities protection determined by the latter The post-war settlement raised an identical problem and an identical solution had to be provided

The minorities Treaties and pre-war settlements compared and contrasted

But certain alterations in the form and procedure of international intervention have been introduced in the post-war Treaties In earlier settlements the Great Powers had the right to intervene singly or in combination There was therefore loophole for interference for political purposes According to the post-war arrangement that defect has been sought to be removed Powers of intervention are now vested in the League of Nations and cases of infraction of the minorities clauses are in certain circumstances required to be submitted for adjudication to the International Court of Justice It is clear, therefore, that, in the first place, intervention is intended only for specific cases of the breach of minorities clauses and

* Treaty Series (1919), No 8, CMD 223

not for political purposes In the second place, the League is designated to act jointly as a single body, and not Powers individually In the third place for the settlement of disputes a legal procedure has been adopted and a judicial machinery has replaced a purely political body There is no doubt that the post-war settlement constituted a great and striking advance on the crude and cumbrous arrangements of pre war days But it must be remembered at the same time that there are certain marked points of similarity between the Minorities Treaties and the earlier settlements The League, for example has no right to interfere with the affairs of the Great Powers of Western Europe Only the sovereignty of the minor States has been affected thus showing that the old line of demarcation between the large States and the smaller nations and between Western Europe and Eastern Europe has been maintained This has given rise to suspicion and mistrust among the smaller nations M Clemenceau was rather too optimistic when he expressed the view that the very knowledge of the existence of the Treaties would remove the necessity for their enforcement, and subsequent events have shown that the Treaties have not succeeded in giving full satisfaction either to minorities or to the States which contain those minorities and come within the purview of the Treaties

M Clemenceau's covering letter to the Polish representative however silenced for the time being all opposition Protests made by the smaller Powers were of no avail And on the 28th of June 1919 the Polish Treaty was signed at Versailles along with the German Treaty The next Treaty signed was with Czecho-Slovakia and this was done at the time of the signing of the Austrian Treaty on the 10th of September at St Germain-en Laye Some difficulty was felt when Roumania* and Yugo-Slavia† came into the picture but ultimately Treaties with them were signed on the

* *Cf* Bratianu's protest at the Conference p 34 *ante*

† *Cf* M Pasic's objection to the Treaty particularly the clause which read as follows Whereas since the commencement of the year 1913 extensive territories have been added to the Kingdom of Serbia. He pointed out that the annexation of the districts won in the Balkan wars had been completed before the outbreak of the war and that it was therefore beyond the competence of the Conference to deal in any way with those districts. (Temperley: A History of the Peace Conference at Paris Vol. V pp. 146-147)

5th of December. Then came Austria, Bulgaria and Hungary. Altogether the texts of minorities protection determined and accepted by the League of Nations comprise (1) five special treaties concluded between the Allied and Associated Powers and Czecho-Slovakia,* Greece,† Poland‡ Roumania § and Yugo-Slavia ,|| (2) four special chapters inserted in the Treaties of Peace of St Germain (Austria),¶ Neuilly (Bulgaria),** Trianon (Hungary),†† and Lausanne (Turkey);‡‡ (3) five Declarations made before the Council of the League by Albania,§§ Esthonia, |||| Finland (for the Aaland Islands),¶¶ Latvia*** and Lithuania††† on or after their admission to the League and‡‡‡ (4) two special Conventions, *viz.*, the German-Polish Convention in Upper Silesia§§§

* See Art 57 of the Treaty signed at Germain en-Laye on September 10, 1919

† See Art 46 of the Treaty signed at Neuilly-Seine on November 27, 1919

‡ See Art 93 of the Treaty signed at Versailles on June 28, 1919

§ See Art 60 of the Treaty signed at Germain-en-Laye on September 10, 1919

|| See Art 51 of the Treaty signed at Germain-en-Laye on September 10, 1919

¶ See Arts 62-69 of the Treaty of St Germain

** See Arts 49 57 of the Treaty of Neuilly signed on November 27, 1919

†† See Arts 54 60 of the Treaty of Trianon signed on June 4, 1920

‡‡ See Arts 37-45 of the Treaty of Lausanne signed on July 24, 1923

§§ See Arts 1-7 of the Albanian Declaration made before the Council of the League of Nations on October 2, 1921

|||| See M De Rio Branco, Rapporter's statement and M Pusta's declaration (Minutes of the Twelfth Meeting of the Twenty sixth Session of the Council held on September 17, 1923)

¶¶ See Arts 1-7 of the Guarantee given to the Aaland Islands and adopted by the Council of the League of Nations on June 20, 1921

*** See M Walter's declaration on behalf of Latvia of July 7, 1923 (Document A 22, 1923 1)

††† See Arts 1-9 of the Lithuanian Declaration made on 12th May, 1922 (Vol XXII of the Treaty Series published by the League of Nations) Iraq also made a declaration guaranteeing protection to her minorities in gaining admission to the League of Nations

‡‡‡ See Arts 64-158 of the German-Polish Convention done at Geneva on 15th May, 1922 (the ratifications were exchanged at Oppeln on June 3rd, 1922)

§§§ See Arts 11 and 27 of the Convention signed at Paris, May 8th, 1924 (the deposit of the ratifications of this Convention by the Lithuanian Government took place at Paris on September 27th, 1924—Treaty Series Vol XXIX) Art 11 lays down that the declaration relating to protection of minorities made by the Lithuanian Government before the Council of the League of Nations on 12th May, 1922, applies to minorities within the Memel territory, with the exception of paragraph 4 of Art 4 of the said declaration which is excluded in view of the provisions of Art 27 of Annex 1 The procedure adopted by the Council of the League of Nations for dealing with petitions concerning the protection of minorities shall be *ipso facto* applicable to petitions concerning the protection of minorities in the Memel territory

Art 27 lays down that the Lithuanian and the German languages shall be recognised on the same footing as official languages in the Memel territory

and the Convention for the Memel territory* In addition *to the above, certain States have concluded special* conventions safeguarding the rights of their respective minorities These, however, have not been placed under the guarantee of the League of Nations, *e g* , the Treaty concluded between Poland and Czecho-Slovakia, 1925 Then there is Art 33 of the Convention of 1920 between Poland and the Free City of Danzig under which the latter undertakes to make provisions for the minorities analogous to those contained in the Polish Minorities Treaty This Convention was supplemented in 1921 by an Agreement between Poland and Danzig under which the question of language and education of the Polish minority in Danzig was dealt with Furthermore, there are two other Conventions called the Greco-Bulgarian Convention of November 27th 1919, and the Greco Turkish Convention of January 30th, 1923 The former deals with reciprocal emigration† and the latter‡ deals with exchange of Greek and Turkish populations

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* See Extracts from the Treaty between Poland and the Free City of Danzig concluded at Paris November 9th 1920 (Vol. VI of the Treaty Series)

† See Vol I No I of the Treaty Series (Arts. 1 16)

‡ See Vol. XXXII of the Treaty Series (Arts. 1 19) This Convention is to be taken as forming part of the Treaty of Peace concluded with Turkey

CHAPTER IV

Provisions of the Treaties

In the preceding chapter an attempt has been made to give in brief outline a picture of the political reconstruction of Europe after the War involving as it has done the creation of new States and large accessions of territory to others and the transference of peoples and races from one State to another The Allied and Associated Powers were instrumental in bringing about that state of things and they claimed to lay down in Treaties or Conventions in regard to the newly created States and those States which received large accessions of territory at their instance certain principles of government in the interest of minorities But although the States of Western Europe also benefited by territorial re-distribution, they were not asked to accept the principles of Minorities protection in Treaties or Conventions under the guarantee of the League of Nations The reasons for this differential treatment were stated in President Wilson's speech at the Peace Conference and also in M Clemenceau's covering letter to the Polish representative Those arguments were not convincing and the discrimination contemplated caused suspicion and bitterness and wounded the susceptibilities of the minor States in Eastern and Central Europe. Protests placed on record by the representatives of those States were of no avail, and the Allied and Associated Powers ultimately made them agree to accept the Treaties imposed upon them The Treaties introduced no new principle in the public law of Europe, for it had been a long-established practice on the part of the victorious Powers to interfere with the affairs of the States of Eastern and

Central Europe for the purpose of protecting the rights of minorities Certain alterations in form and procedure of international control and supervision were however effected under the post-war Treaties which will be discussed later on The first Treaty in the series was concluded with Poland and that Treaty was the model for other minorities Treaties

The Preamble to the Polish Treaty analysed.

The Polish Treaty is divided into two parts the first part dealing with what may be called its preamble and the second part dealing with actual provisions for the protection of minorities The second part again contains two chapters of which the first part, consisting in all of twelve articles forms the subject-matter of this study The preamble begins with a declaration that the Polish nation owes to the success of the Allied arms its independence of which it had been unjustly deprived It refers to the fact that by the proclamation of March 30 1917 Russia had already assented to the re-establishment of an independent Polish State In that proclamation the Allied and Associated Powers recognised the fact of Polish sovereignty over *those portions of the Russian Empire where the Poles were in the* majority They referred to Clause 93 of the Versailles Treaty by which it was agreed that the boundaries of Poland not yet determined should be fixed by them making it clear at the same time that certain parts of *the former German Empire would undoubtedly* be incorporated in the territory of Poland While thus recognising that Poland was an independent member of the family of nations the Allied and Associated Powers expressed their anxiety to see that the provisions of Clause 93 of the Treaty of Peace with Germany were acted upon Poland in her turn held out the promise that she would conform her institutions to the principles of liberty and justice, and give a sure guarantee to the inhabitants of the territory over which she has assumed sovereignty It will be thus seen that although the procedure adopted in this case marks a departure from the Treaty of Berlin in that Poland s undertaking is not made a condition precedent to her admission to the family of sovereign States such admission is treated as a counterpart to certain engagements on the part of Poland which she had to fulfil

When Poland's sovereignty was legally recognised.

There is one point, in this connection, which ought to be made clear A case might be made out to show that Poland had received recognition before the War ended because public utterances had been made before the close of the War by the Powers, Allied as well as Central, of her right to independence. It would appear, however, that her internal conditions were unstable On the 5th November, 1916, the independence of Russian Poland had been declared by Germany and Austro-Hungary But the Polish Regency Council, which ruled Russian Poland, was certainly under German or Austro-Hungarian control until the 11th of November, 1918, and after that date, a period of something like anarchy ensued which was not put an end to until the 30th of December, 1918 Consequently, Poland did not in fact fulfil the conditions of a State until that date, or perhaps, until some days later It might reasonably be held that the final admission of Poland's Plenipotentiaries to the Peace Conference on the 18th of January, 1919, was the earliest date at which her independence was legally recognised Some authorities even place that date as late as the date of the signature of the German Treaty (28th of June, 1919) Even then the Polish boundaries were not yet everywhere defined * The conditions necessary for the existence of an independent State have provoked much controversy among international lawyers They are, however, agreed on the following points A State, for example, must have (1) a definite territory with a population inhabiting that territory and (2) exercise internal and external sovereignty subject, where necessary, to certain international understandings

The contents of the Treaty

The contents of the Treaty may be examined under four heads as has been pointed out by Mr L Evans,† namely, (1) fundamental principles of universal application (in the Treaties with Austria, Hungary and Bulgaria all the minorities articles or clauses, and not merely those defined in the Polish Treaty as fundamental principles, are recognised as fundamental laws),‡ (2) educational

* Temperley A History of the Peace Conference, Vol V, p 158

† The British Year Book of International Law, 1923-24, pp 104-105

‡ Art 62 of the Austrian Treaty

facilities at State expense very much restricted in their application, (3) special clauses designed to meet the special needs and circumstances of the country concerned and (4) machinery and procedure to deal with the problem of minorities protection It may be noted in passing that almost all the Minorities Treaties contain similar provisions dealing with each of these heads The following table will make the proposition clear and is intended to show the identical clauses in the Treaties, Conventions and Declarations

Concordance of the Minority Clauses *

Treaty with	Articles							Council resolution.
Poland	1	2	6	7	8	9	12	13 Feb, 1920
Czecho-Slovakia	1	2	6	7	8	9	14	29 Nov 1920
Yugo Slavia	1	2	6	7	8	9	11	29 Nov, 1920
Roumania	1	2	6	8	9	10	12	30 Aug, 1920
Austria	62	63	65	66	7	68	69	22 Oct, 1920
Hungary	54	55	57	58	58	59	60	30 Aug, 1921
Bulgaria	49	50	52	53	54	55	57	27 Oct, 1920
Albania	1	2	3	4	5	6	7	2 Oct 1921
Greece	1	2	6	7	8	9	16	26 Sept, 1924
Lithuania	1	2	3	4	5	6	9	11 Dec 1923
Turkey	37	38	0	39	40	41	44	26 Sept 1924
Upper Silesia	65	66	0	67	68	68	72	20 July, 1920

Provisions dealing with special rights of particular minorities are to be found in the following clauses

Special Provisions

Poland	10-11
Czecho-Slovakia	10-13
Yugo-Slavia	10
Roumania	11

* League Document C L. 110 1927 (Annex I); Temperley: A History of the Peace Conference Vol. V

Austria ..	64
Hungary .	56
Bulgaria	51, 56
Greece .	3, 4, 5, 10, 11, 12, 13, 14, 15
Turkey	42, 43, 45
Lithuania ..	7, 8
Upper Silesia .	64, 70, 71

The general principles enunciated under the first head are designed to meet the elementary ideas of justice and liberty and "represent a necessary condition of State life and even of State existence in racially mixed districts" According to Article 1 Poland undertakes to recognise the stipulations contained in Articles 2-8 as the fundamental laws of the land and to observe that no law, regulation or official action shall conflict or interfere with or prevail over these stipulations Article 2 lays down that Poland must assure full and complete protection of life to all inhabitants of Poland* without distinction of birth, nationality, language, race or religion and must not interfere with the exercise, whether public or private, of any creed, religion or belief not inconsistent with public order or public morals In Article 6 it is clearly stated that all persons born in the Polish territory, who are not born nationals of another State, shall *ipso facto* be admitted as Polish nationals The next article points out that all such nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race, language or religion and that differences of religion, creed or confession shall not prevent any Polish national from enjoying civil or political rights such as admission to public employments, functions and honours or the free exercise of professions and industries It then goes on to add that no restriction shall be imposed on the free use by any national of any language in private intercourse, in commerce, in religion, in the Press or in publications of any kind or at public meetings. Poland is given power to establish her national language, but it

Fundamental Principles of protection

* Art 2 seeks to protect the civil rights of all inhabitants of Poland irrespective of their nationality No discrimination in this respect is contemplated as between nationals and non-nationals.

shall not be made to interfere with the use by Polish nationals of any non Polish speech, either orally or in writing, before the courts of law, for which adequate facilities must be given

Provisions in the Treaty incorporated in the constitution.

All these provisions regarding civil and political rights incorporated in the Minorities Treaty are confirmed and reiterated in the constitution of the Polish Republic adopted on the 17th of March, 1921 * There we find all Polish citizens being treated in law on a footing of equality Public employments are thrown open to all without distinction of birth *No privileges of creed or caste are recognised † No law can deprive* a citizen, who is the victim of executive wrong or injustice of judicial means of redress ‡ The rights of property are guaranteed § The dwelling of the citizen is to be regarded as inviolable || Within the country every citizen is entitled to change his domicile or place of residence ¶ He is given the right to express his ideas and opinions freely subject to the essential condition that thereby he may not violate the law of the land There is also the liberty of the Press and it is distinctly laid down that the Press will not be subject to any kind of censorship ** Freedom of association or *meeting is guaranteed and safeguarded †† The right to safeguard* his nationality and to cultivate his own national language and custom is conferred on every national Special laws of the State guarantee to the minorities within its jurisdiction full and free development of their national customs Again the racial religious or linguistic minorities in Poland have equal rights with other citizens in forming controlling or administering at their own expense social religious and charitable institutions and therein they are entitled to the free use of their own language and unrestricted practice of their religion ‡‡ Each and every national enjoys liberty of conscience and religion His religion or religious conviction cannot be used as a ground for denying him any rights to which a fellow national is entitled The right to prac

* Select Constitutions of the World (Irish Publication) pp. 74-80 The constitution has since undergone considerable changes

† Art. 90.

‡ Art. 98.

§ Art. 99

|| Art. 100.

¶ Art. 00.

** Art 105

†† Art 108.

‡‡ Art. 110

tise his form of belief in public or in private and to follow the rites and precepts of his religion is admitted * Every religious association is entitled to hold its meetings and assemblies for the conduct of religious services in public; it can freely manage its own affairs and maintain institutions for religious and charitable purposes † The churches of religious minorities are to be governed by their own laws which the State must recognise ‡ The recognition of religious bodies, either new or not hitherto legally recognised, shall not be refused provided that the organisation, teaching and precepts of such associations are not opposed to public order or morality.§ Similar provisions are made also in the constitutions of other countries which are bound by the Minorities Treaties || In Czecho-Slovakia the matter has been carried a little further, particularly in regard to the linguistic rights of minorities and grants-in-aid to minorities schools Article 29, for example, lays down that the principles upon which the rights of languages of the minorities shall be based shall be determined by special law which must form part of the constitutional charter of the land Article 134 prohibits forcible de-nationalisation, and the violation of the principle therein laid down constitutes a criminal offence Further, the rights guaranteed under Articles 130-132 relating to the medium of instruction and grants-in-aid to minorities schools and institutions are to be provided for in a specific manner by special legislation

It is laid down in Article 3 of the Polish Minorities Treaty that the Polish nationals belonging to racial, religious or linguistic minorities shall enjoy the same status and treatment in law and in fact as other nationals In particular, the former are given the right to establish, manage and control at their own expense charitable, religious or social institutions, schools and other educational establishments with power to use their own language and freely to exercise their own religion The section containing Articles 2-5 is specially important inasmuch as it secures to all *bona-fide* inhabitants of the ceded districts of Poland the rights

* Art 111
† Art 1
‡ Art 115
§ Art 116
|| The Czecho Slovakian Const , Arts 3, 94 (2), 106 (2), 107, 121, 122, 124, 128, 129, 130

and privileges of Polish nationality and citizenship They cannot be treated as aliens in the land of their birth The Germans, the Ruthenians or the Jews resident in Poland, who were formerly Austrian German or Russian subjects, are all thus admitted to Polish citizenship The difficulties that arose in Roumania after the Treaty of Berlin, 1878, in regard to the acquisition of citizenship by the Jews are thus sought to be solved in the case of the Polish minorities * There is only one exception and that applies to those Germans who had settled in the Polish Provinces as a result of the Colonisation Scheme formulated by the Prussian Government The Colonisation Commission was empowered to expropriate land owners and the power was freely and indiscriminately used with the result that the Germans benefited at the expense of the Polish citizens Such Germans cannot claim Polish citizenship as a matter of right †

A word or two is necessary in this connection in regard to the Polish law of nationality It is laid down in the Polish constitution‡ that a Polish national may not be simultaneously a national of any other State Polish nationality is acquired by (*a*) birth and (*b*) naturalisation granted by the competent State authority § With regard to the question as to how Polish citizenship or nationality is determined and acquired, the constitution of the 17th of March 1921 was preceded by the law of the 20th of January 1920 || Regulations of the 13th of July 1920 and lastly Order No 540 of the 11th of the same year The law of the 20th of January 1920 the enforcement of which is regulated by the order of the 7th of June 1920 has been as the editors of Nationality Laws point out, the law governing nationality in Poland It is still in force supplemented as it is by the law of nationality incorporated in the constitution According to the laws of January 1920 a Polish citizen cannot be at one and the same time a citizen of another country ¶ Citizenship is acquired

The Polish law of Nationality

* *Cf* The Roumanian Naturalisation Law of 1879 *supra* p 23.
† *Vide* The Treaty of Peace with Germany
‡ Art. 87
§ Art 88.
|| Order of the Minister of the Interior 7th June. 1920
¶ A Collection of Nationality Laws edited by Flournoy and Hudson

by (*a*) birth, (*b*) legitimatisation, recognition or adoption, (*c*) marriage, (*d*) grant, (*e*) admission to public office or to military service in the Polish State provided that no stipulation to the contrary is made.* It is lost by (*a*) acquisition of foreign citizenship and (*b*) acceptance of public office or military service under a foreign State without the consent of the Polish Government.† In certain exceptional cases citizenship may be granted to persons who do not satisfy the requirements contained in Article 8 of the law of January, 1920, particularly in the territory of the former Russian Empire which has been ceded to the Polish State.‡

Under the second head come provisions for facilities of education at State expense. Article 9 of the Polish Minorities Treaty lays down: "Poland will provide in the public educational system in towns and districts in which a considerable portion of Polish nationals of other than Polish speech are residents adequate facilities for ensuring that in the primary schools the instruction shall be given to the children of such Polish nationals through the medium of their own language. This provision shall not prevent the Polish Government from making the teaching of the Polish language obligatory in the said schools." We find further that "in towns and districts where there is a considerable proportion of Polish nationals belonging to racial, religious or linguistic minorities, these minorities shall be assured an equitable share in the enjoyment and application of the sums which may be provided out of public funds under the State, municipal or other budgets, for educational, religious or charitable purposes." Unlike the provisions regarding what are called the Fundamental principles, this clause "shall apply to Polish citizens of German speech only in that part of Poland which was German territory on August 1, 1914." Article 9 of the Czecho-Slovakian Treaty lays down: "Czecho-Slovakia will provide in the public educational system in towns and districts in which a considerable proportion

Provisions for the use of minority languages and distribution of public money for educational, charitable and religious purposes.

* Art. 4.
† Art. 11.
‡ Art. 9.

of Czecho-Slovak nationals of other than Czech speech are resi dents adequate facilities for ensuring that the instruction shall be given to the children of such Czecho-Slovak nationals through the medium of their own language This provision shall not prevent the Czecho Slovak Government from making the teaching of the Czech language obligatory ' A provision similar to that contain ed in the Polish Treaty is made in regard to the distribution of public money for educational, religious or charitable purposes It is stated, for example, that in towns and districts where there is a considerable proportion of Czecho-Slovak nationals belonging to racial religious or linguistic minorities these minorities shall be assured an equitable share in the enjoyment and application of the sums which may be provided out of public funds under the State municipal or other budgets for educational, religious or charitable purposes It must be noted that the provisions in the Czecho-Slovakian Treaty are not restricted to certain definite territories as in the case of Poland for the obvious reason that Czecho-Slovakia emerged completely as a new State But after having provided identical safeguards in Article 9, the Treaty with Yugo-Slavia follows the Polish precedent in the matter of restricted application of those safeguards and makes it clear that ' the provisions of the present Article apply only to the territory transferred to Serbia or to the Kingdom of the Serbs Croats and Slovenes since the first of January 1913 Corresponding safeguards have also been provided for Roumania Bulgaria Austria Hungary and Turkey and in none of those States does the principle of restricted application apply as in the case of Poland and Yugo-Slavia It is interesting to add that so far as the three ex-enemy countries are concerned namely Austria Hungary and Bulgaria, the provisions regarding educational facilities are included under what are called the Fundamental Laws not so however is the case with the other old or newly created States

Special provisions embodied in the constitutions.

Certain States have incorporated safeguards in their respective constitutions relating to educational facilities, the use of the minority languages as a medium of instruction and the distribution of public funds for educational, religious and chari

table purposes Thus in Article 131 of the Constitution of Czecho-Slovak Republic it is laid down

> "In towns and districts where a considerable proportion of Czecho-Slovak citizens speak a language, other than the Czecho-Slovak language, facilities shall be guaranteed within the limits laid down by general educational legislation to enable the children of such citizens to receive instruction in their own tongue Instruction in the Czecho-Slovak language may at the same time be made obligatory "*

The next Article provides that "in towns and districts where a considerable proportion of Czecho-Slovak citizens belong to a minority as regards race, religion or language and where sums of public money are set aside for educational purposes in the State or municipal budget or otherwise, a due share in the allocation and use of such sums shall be accorded to such minorities within the limits of the general regulations concerning public administration."†

In the constitution of Yugo-Slavia minorities in race and language are guaranteed primary instruction through the medium of their mother-tongue "under conditions to be prescribed by law" It does not speak of "a considerable proportion of the population," nor does it lay down any law regarding the allocation of money out of State, municipal or other budgets, to the minority communities ‡

It will appear that no consistent policy has been followed in the Minorities Treaties regarding this subject § It is difficult to

* Mark the difference between "may" and "shall" in legal instruments As a general rule the former is facultative while the latter is mandatory But in certain cases "may" has the force of "shall" If, for example, a statute enacts that a Railway Company "may" open a line, the power conferred is discretionary, for it is intended that the donee is competent to consult his private interests or convenience If, on the other hand, a statute enacts that a judiciary "may" adjudicate upon certain cases, the power is mandatory, for it is its duty to secure justice and prevent wrong in public as well as private interests In this clause it seems that "may" should be read as "shall" (Maxwell Interpretation of Statutes, pp. 212-14)

† Select Constitutions of the World (Irish pub), p 167

‡ Art 16

§ *Supra*, p 52

No consistent and uniform policy followed in some States these special provisions considered as fundamental laws and applied throughout their territories.

understand why a special case of restricted application of educational safeguards was made out for Poland and Yugo-Slavia while no such limitation was insisted upon in the case of Austria, Hungary, and particularly Roumania Mr Evans seems to suggest justification for this differential treatment accorded to Austria and Hungary on the presumption that they were new States seeking recognition But as a matter of fact Austria and Hungary are no new States Further, there is no reason why the whole article should apply to the old State of Bulgaria and not to old Serbia in view of President Wilson s observation to the following effect You cannot in one part of the transactions treat Serbia alone and in all the other parts treat the Kingdom of the Serbs, Croats and Slovenes as a different entity This discriminatory treatment read with the treatment accorded to the three ex-enemy countries which have been required to recognise these provisions as their fundamental laws* appears, as Mr Evans puts it to be making an invidious distinction not easily reconciled with the avowed objects of the Minorities Treaties themselves †

Expressions such as a considerable proportion of the population, towns and districts and an equitable share raise difficulties.

The difficulties in regard to the subject do not stop there It is well known that the expression a considerable proportion of the population which had been left undefined in all the Minorities Treaties subsequently gave rise to a considerable measure of confusion and trouble which have however been sought to be solved by reference to the special needs and circumstances of each case The proportion of population entitled to protection under this head varies from State to State In Poland‡ the recognisable minority amounts to 25 per cent of the population In Czecho-Slovakia§

* Supra p 52

† The British Year Book of International Law 1923-24 p 109

‡ A series of language laws passed on July 31 1921, by the Grabski Government

§ The Government reply dater the 14th Aug 1922 (C 568 M 359 1922.I)

it is twenty-three per cent while the minimum limit seems to be twenty per cent which prevails in Hungary.* In no case has a lower proportion than twenty per cent of the total population been accepted as creating a title to protection in such matters. But the difficulty in regard to "districts and towns" has not yet been solved and cannot so easily be solved. Their boundaries might be altered by an executive fiat thus rendering legal provisions for safeguards null and void for all practical purposes. "Towns and districts," as Mr. Evans remarks, "are not immutable concepts."† Moreover, "an equitable share" is an elastic expression so that it depends upon the executive authorities to decide what is equitable share and what is not. Last of all, it would be borne in mind that the language safeguard in schools is confined to the primary standard only, and here again the Government of each State has power under the law to make the study of the national language obligatory and that power seems to be mandatory despite the use of the term "may." It is therefore wrong to suppose that the majority and the minorities are treated on terms of perfect equality with respect to their respective languages.

The protection of minorities in Czecho-Slovakia, Masaryk's contribution to the solution of the problem. Liberal provisions for minorities—they are associated with the administration.

The problem of minorities was one of the most difficult and most acute of its kind in Czecho-Slovakia. There the Government had to deal with a highly cultured and powerful German Minority amounting to 23 per cent of the total population—a minority who had before the War been an entirely sovereign people. But attempts to solve the problem there have met with a measure of success, as is pointed out by Professor Gilbert Murray.‡ The success is due mainly to the liberal interpretation of the principles of minorities protection and to the generous spirit in which those principles have been and are being applied. Ample evidence of that spirit is to be found in the policy formulated by T. G.

* Hungarian Language Laws passed in 1923 and 1924 (C. J. Aug. 25).

† The British Year Book of International Law, 1923-24, p. 107.

‡ Murray's Introduction to Miss Mair's The Protection of Minorities.

Masaryk, late President of the Czecho-Slovak Republic, whose contribution to the unification of different elements in the population has been immense ' The rights of race, he observes, must be safeguarded Local self-government and proportional representation may in a democratic State, serve the purpose well Each minority too must have elementary and secondary schools of its own * Then again as a political entity and a military organisation our State and its army will use the Czech or Slovak language in accordance with the democratic principle that the majority decides But while the State must be Czecho-Slovak, its racial character cannot be settled by the official language alone It is, he goes on to add, in the interests of the racial minorities to learn the State language, but it is also in the interest of the majority to speak the languages of the minorities especially that of the biggest minority The teaching of languages in the schools will be arranged on this basis Masaryk proceeds further and points out that a proposal was adopted without discussion as something self evident that a German Minister should be included in the Government In a democracy he says it is obviously the right of every party to share in the administration of the State as soon as it recognises the policy of the State and the State itself Nay it is its duty to share in it There is, therefore no doubt that in actual administration Czecho-Slovakia has gone far ahead of the provisions of the Minorities Treaties In the Treaties generally the use of minority languages as a medium of instruction was intended for primary schools Masaryk however, makes it clear that the Czecho-Slovak Treaty clauses are not confined to primary schools and it is remarkable and interesting to note that three million Germans in Czecho-Slovakia have got a University and two technical high schools Masaryk as we have already shown, accepted the principle of associating representatives of the minorities with the Government of the country and as an earnest of his intention he gave practical effect to that principle by inviting representatives of minorities to accept offices in his Cabinet at Prague

* T G Masaryk The Making of State pp 387-390

Hungary's gestures to minorities in regard to language safeguards and their representation in Public Services

In this connection the Law of Hungary, which has a chapter on Minorities Protection in its Treaty of Peace, is also instructive and important The new Kingdom of Hungary issued a decree in August, 1919—the decree is not of course embodied in the Treaty—in which it laid down certain rules and regulations with a view to effective protection of racial, linguistic and religious minorities Those rules and regulations are large in number and deal mostly with what may be called the language safeguards Of peculiar and special importance, however, are Clauses 13 and 15 of the decree In Clause 13 we find that "citizens of the State belonging to racial minorities and living in sufficiently considerable compact masses in the territory of the State may have facilities in the State educational establishments of the area where they reside for their children to be educated in their native language as far as the initial stages of higher education In the Universities special Chairs will be established for the study of the language and literature of each racial minority "* The principle of Czecho-Slovak practice in regard to public employments emphasised by Masaryk in his book entitled *The Making of State* is embodied in Article 15 of the decree which states " that the Government binds itself to see that judicial and administrative posts, especially those of subprefects are filled, wherever possible, by persons belonging to racial minorities and knowing their languages "

Special clauses to meet special needs the position of the Jews in Poland and Roumania

Now, we come to the third head, namely, special clauses imposed upon certain particular States for the purpose of meeting special needs and circumstances The position of the Jews, as we have pointed out in connection with the earlier international settlements, caused considerable anxiety among the great European Powers The Jews had claimed for long a nationality for themselves and their point of view had to be considered at the Conference of Paris in all its bear-

* Read in this connection Numerous Clausus Law (XXV 1920) O J, Nov 1922 C 97 M 52, 1922 I.

ings The question provoked acute differences of opinion among the delegates themselves The English Jews pressed for giving to their co-religionists nothing more than the widest possible personal liberty and the right to the free exercise of their religious beliefs and maintenance of their special customs, usages and traditions * But a party arose which demanded the recognition of the Jewish residents or settlers in Poland and other States as a separate political entity, thus seeking to create what is known as *imperium in imperio* That claim was turned down and M Clemenceau made it clear that the clauses of the Treaty do not constitute any recognition of the Jews as a separate political entity within the Polish State It was however, decided that if there was to be a separate and distinct Jewish nationality, the Jews should be given a local habitation and be enabled to establish a State of their own in Palestine Any citizen of such a State should cease to be a national of Poland or for that matter of any other State So far as the question of protection immediately confronting the Conference was concerned safeguards were provided for the Jews in Poland and Roumania Safeguards were later guaranteed for the benefit of the Jews in Greece Lithuania and Upper Silesia Similar provisions were made for the Moslems in Greece and non Moslems in Turkey

So we find that Article 10 was inserted in the Polish Treaty in order to extend necessary protection to the Jews resident in Poland The Article lays down

> Educational Committees appointed locally by the Jewish community in Poland will subject to the general control of the State provide for the distribution of the proportional share of the public funds allocated to Jewish schools in accordance with Article 9 and for the organisation and management of these schools

Then further the provisions of Article 9 concerning the use of languages in schools shall apply to these schools

* Temperley A History of the Peace Conference Vol V p. 130.

Protection of the Jews in Poland the Jewish Committees in charge of public funds for Jewish schools

It shows that Article 9 applies to the Jews as much as to other minorities, being a considerable proportion of the entire population, and that they are entitled to use their language in primary schools and get a proportionate share of public funds as other minorities The clause not only lays down the broad principles but also indicates the specific procedure for their application The public funds allocated to them are to be distributed, subject to the general control of the State, by local Committees appointed by the Jews and obviously inspiring their confidence * The Jews are also given ample freedom to observe their *sabbath* in accordance with their immemorial custom And this freedom is guaranteed in Article 11 of the Treaty which runs as follows

> " Jews shall not be compelled to perform any act which constitutes a violation of their *sabbath*, nor shall they be placed under any disability by reason of their refusal to attend courts of law or to perform any legal business on their *sabbath* This provision, however, shall not exempt Jews from such obligations as shall be imposed upon all other Polish citizens for the necessary purposes of military service, national defence, or the preservation of public order
>
> " Poland declares her intention to refrain from ordering or permitting elections, whether general or local, to be held on a Saturday, nor will registration for electoral or other purposes be compelled to be performed on a Saturday "

The position of the Jews in Roumania the new law of nationality removes a long-standing grievance

The troubles concerning the Jews in Roumania had not, however, been solved since 1878, although the provisions of the Treaty of Berlin, so far as they related to that country, were intended for their protection † Civil and political equality was guaranteed to all persons in Roumania and nationals as well as foreigners were assured religious toleration Roumania did not sign the Treaty

* The educational clause of the Lausanne Treaty (Art 40) provides that the sums allotted by the Government to minority communities shall be paid to qualified representatives of the establishments concerned

† *Supra*, p 23

and therefore the provisions remained a dead letter The Rouma nian Naturalisation Law treated the Jewish residents as aliens in violation of the Treaty of Berlin But the Great Powers failed to act in concert and had neither the time nor the inclination to enforce the Treaty In the Minorities Treaty with Roumania, therefore, special care has been taken to define her nationality and Articles 3-7 state the law on the subject * The Jewish commu nity are given special protection under Article 7 by which Roumania undertakes to recognise as her nationals *ipso facto* and without the requirement of any formality the Jews inhabiting any Roumanian territory, who do not possess any other nationality Thus in law at any rate the chapter of Roumania s tyranny over her Jewish residents is closed for the time being The general provisions of the Treaty are extended to Bessarabia by the Treaty of October 28 1920, which assigned that place to Roumania but the special safe-guards provided for the Jews in the Treaty are however omitted

The Saxons and Czecklars in Transylvania given local autonomy in scholastic and religious matters

Article 11 of the Roumanian Treaty is relevant to the point under discussion inasmuch as thereby Roumania promises to accord to the communities of the Saxons and Czecklars in Transylvania local autonomy in regard to scholastic and religious matters That provision is of course subject to the general control of the State

How and why Ruthenia forms part of Czecho-Slovakia.

The Treaty with Czecho-Slovakia is important in this connection not because it extended protection to any particular community but because one of the two chapters into which the Treaty is broadly divided creates a separate administration for the Ruthene territory Czecho-Slovakia s position in that territory is something like that of a special kind of mandatory † In dealing with it the Conference of Paris had a large number of alternative issues before it Would Ruthenia be allowed to continue as part of the State of Hungary? The answer

* Temperley : A History of the Peace Conference pp 456-57
† The British Year Book of International Law 1923-24 p. 110.

was in the negative, for the old and offensive policy of Magyarisation had to be put an end to at all costs Would it be constituted into a completely sovereign and independent State? The answer was again in the negative in view of the scanty area that could be covered and of the general illiteracy of the people and of their racial characteristics Nor was it possible in 1919 when the world had no definite idea of the Russian position to bring about a reunion of the Ruthene peoples, namely, the Ruthenians and the Ukranians who both belonged to the same racial stock It was, therefore, finally decided to hand the Ruthene territory over to Czecho-Slovakia, subject to certain clear and definite safeguards, although the people of the territory did not speak the Czecho-Slovak language

Ruthenia promised local autonomy provisions for effective representation of Ruthenians in local Public Service and in the Czecho-Slovak Assembly

The second chapter of the Treaty confers on Ruthenia a considerable measure of local autonomy not only in religious, linguistic or racial matters but also in subjects relating to the administration Ruthenia is given the fullest measure of self-government compatible with the unity of the Czecho-Slovak State * It is given a special legislative body called the Diet with wide delegated powers from Czecho-Slovakia The Governor of the place is to be a nominee of the Czecho-Slovak State but shall be held responsible to the local Diet † The appointment of officials of the territory is vested in the Czecho-Slovak State, but it is stipulated at the same time that public offices should be filled up, as far as possible, by the inhabitants of Ruthenia ‡ The in the Legislative Assembly of Czecho-Slovakia the territory is given adequate and perhaps effective representation. The Deputies are, however, to be elected according to the Czecho-Slovak constitution, but they have no right

* Art 10

† Art 11 The arrangement seems to be anomalous leaving as it does room for frequent conflicts between the Diet and the Central authority Note recent tendencies in the practice in the Dominions some of whom have successfully asserted their right to nominate the Governor-General

‡ Art 12

to vote in the Czecho-Slovak Assembly ' upon legislative questions of the same kind as those assigned to the Ruthene Diet *

Just as Poland and Roumania had to deal with the problem of the Jews, so was Yugo-Slavia, otherwise known as the Kingdom of the Serbs, Croats and Slovenes called upon to give protection to its Mahomedan citizens It is well to re call that Yugo-Slavia did not accept the Minorities Treaty without protest It pointed out that the an nexation of the territories which had been completed before the War did not come within the purview of the Paris Conference To that the answer was given that the Powers had not recognised those accessions of territory and could therefore ignore them So the Conference finally exercised its power to impose the Treaty on Yugo-Slavia without listening to its protest After laying down the general principles of protection and providing specific safeguards in the matter of medium of instruction in *primary* schools of the minorities and distribution of public funds for educational religious and charitable purposes in certain definite districts and towns † the Treaty‡ proceeds to give special protec tion to the Mussalmans inhabiting the Kingdom It lays down

Yugo-Slavia makes provisions for the protection of its Mahomedan citizens

> The Serb Croat-Slovene State agrees to grant to the Mussalmans in the matter of family law and personal status provisions suitable for regulating those matters in accordance with Mussalman usage
>
> The Serb-Croat-Slovene State shall take measures to assure the nomination of a Reiss-ul Ulema
>
> The Serb Croat-Slovene State undertakes to ensure protection to the mosques cemeteries and other Mussalman religious establish ments Full recognition and facilities shall be assured to Mussalman pious foundations (Wakfs) and religious and charit able establishments now existing and the Serb-Croat Slovene Government shall not refuse any of the necessary facilities for the creation of new religious and charitable establishments guaranteed to other private *establishments of this nature*

* Art. 13 Note the provisions in the Government of India Act 1935 relating to the representatives of the Indian States in the Federal legislature and their powers and the British Indian demand in that behalf

† *Supra* p 62

‡ Art. 10.

The Treaty of Sevres safeguards the rights of minorities but it was not ratified.

Ample provisions for the protection of minorities in Turkey and Greece were made in the Treaty of Sevres They secured all the guarantees laid down in the Minorities Treaties, additional guarantees for the minorities in Asia Minor, retention or restoration of the old ecclesiastical and educational privileges extended to minorities under the Islamic law and provided for any other guarantees required by circumstances Elaborate arrangements were also contemplated for the restoration of the confiscated property of non-Moslems and invalidating, on certain conditions, the forced conversion to Islam effected after November, 1914 These points were emphasised by Lord Curzon in the course of a speech made in the House of Lords on the 30th of March, 1922 But that Treaty was not ratified in so far as it affected Turkey, and the Treaty of Lausanne had to be drawn up and signed * The Treaty of Serves was signed on the 10th August, 1920, and the Treaty of Lausanne was signed on the 20th of July, 1923, but the provisions in both the Treaties came into force with effect from the 30th of August, 1924 Safeguards for the Jews in Greece are to be found in Article 10 of the Treaty of Sevres,† which lays down "In towns and districts where there is resident a considerable proportion of Greek nationals of the Jewish religion, the Greek Government agrees that these Jews shall not be compelled to perform any act which constitutes a violation of their *sabbath*, and that they shall not be placed under any disability by reason of their refusal to attend the Court of Law or to perform any legal business on their *sabbath* This provision shall not exempt Jews from such obligations as shall be imposed upon all other Greek nationals for the necessary purposes of military service, national defence or the preservation of public order "

Then by Art 12 Greece undertakes to accord to the communities of the *Valachs* of Pindus autonomy under her control in respect of religious, charitable and scholastic matters The next article makes it obligatory on the part of the Greek Govern-

* On the 24th of July, 1923

† This Treaty was signed in accordance with Art 46 of the Treaty of Neuilly of November 27, 1919

ment to recognize and maintain the traditional rights and liberties enjoyed by the non Greek monastic communities of Mount Athos which had been laid down under Article 62 of the Treaty of Berlin of 1878

The protection to Moslems in regard to their family law and personal status is accorded by Greece under Article 14 It provides

> Greece agrees to take all necessary measures in relation to Moslems to enable questions of family law and personal status to be regulated in accordance with Moslem usage
>
> Greece undertakes to afford protection to the mosques cemeteries and other Moslem religious establishments Full recognition and all facilities shall be assured to pious foundations (wakfs) and Moslem religious and charitable establishments now existing and Greece shall not refuse to the creation of new religious and charitable establishments any of the neces sary facilities guaranteed to other private establishments of this nature

Under the Treaty of Sevres Greece agreed to consider the claims of minorities in regard to the electoral system in so far as it applied to the new territories acquired by her since August 1914,* and also in regard to the composition of the Municipal Council of the town of Adrianople † But these provisions were *abrogated inasmuch as the relevant clauses were suppressed* by virtue of the Protocol signed at Lausanne in July 1923 ‡

It shall be noted that France and Great Britain renounced under the Treaty as far as they were concerned the special rights of supervision and control in relation to Greece and the Ionian Islands which they had undertaken under the Treaty of London 1863 the Treaty of London 1864 and similar rights conferred upon them by the London Protocol of 1830 to ensure the protec tion of minorities

By the Treaty of Lausanne Turkey undertakes to protect her non Moslem citizens.

The Treaty of Lausanne adopts the general clauses of the European Minorities Treaties together with a few special clauses to meet the peculiar circumstances of the country The third clause of Article 42 lays down that the

* Art 7 (2nd paragraph) † Art. 15

‡ Art. 2 of the Lausanne Protocol 1923.

Turkish Government must give full protection to the churches, synagogues, cemeteries and other religious establishments of the minorities All facilities and authorisations shall be granted to the pious foundations and to the religious and charitable institutions of the minorities inhabiting Turkey and the Turkish Government will not refuse, in the formation of new religious and charitable institutions, any of the necessary facilities which are guaranteed to other private institutions of a like nature In the same article we find that the Turkish Government undertakes to adopt "as regards non-Moslem minorities, in so far as concerns their family law and personal status, measures permitting the settlement of these questions in accordance with the customs of those minorities" It is provided further that these measures will be elaborated by Special Commissions composed of representatives of the Turkish Government and of representatives of each of the minorities concerned in equal number In the case of divergence the Turkish Government and the Council of League of Nations will appoint in agreement an Umpire chosen from amongst European lawyers

The Treaty made it clear* that the rights conferred by provisions contained therein on non-Moslem minorities of Turkey would be similarly conceded by Greece to the Moslem minority in her territory Then, it is stipulated† that Turkish nationals belonging to non-Moslem minorities shall not be compelled to perform any act or acts constituting a violation of their faith or religious observances, and shall not be placed under disability because of their refusal to attend courts of law or perform any legal business on the day of their rest

How other States such as Albania, Finland, Lithuania, Latvia and Esthonia were made to fall in line by declarations

With the exception of the Treaty of Sevres and the Treaty of Lausanne, we have so long dealt with the Minorities Treaties which had been concluded before the League of Nations came into existence At the first meeting of the League in December, 1920, the view was expressed that all new members admitted to the League should be asked to sign similar Treaties Lord Cecil introduced a motion

* Art 45
† Art 43

stating that the Assembly is not prepared to admit any new State to the League unless it will give an undertaking to enter into agreements corresponding with the Minorities Treaties already accepted by several other States The motion provoked considerable opposition It was finally decided that the condition insisted upon by Lord Cecil would apply only to certain definite States, namely, Albania the Baltic and Caucasian States It was further decided that the agreement should not be made a condition precedent to admission to the League The States as a result were not called upon to sign Treaties but they had to make declarations * The States which accordingly made declarations, were Albania, Finland Lithuania, Latvia and Esthonia

In Article 2 of the Albanian declaration we find the same stipulations as in the Yugo-Slav Treaty made in regard to the regulation of family law and personal status of the Musalmans in accordance with their usage † Article 4 provides, among other things, that an electoral system giving due consideration to the rights of racial, religious and linguistic minorities will be devised It is further provided that the Albanian Government should inform the League of the legal status assigned to the institutions of minorities under the provisions of the Minorities Treaties The Government also agreed to consider carefully and with due attention the advice of the League in the matter ‡ There was no difficulty in bringing this country under the jurisdiction of the League It raised no objection on grounds of principle But Greece made two demands, namely that inasmuch as Albania contained a Greek minority she should enjoy the right although she was not a member of the League Council to raise before it the question of infraction of the Treaty by the Albanian Government and secondly that a resident delegate should be appointed on behalf of the League to look after the interests of the minorities in

* See Report of the Third Assembly of the League on the work of the Council, p 451 (Para 1)

† Art. 10 Yugo-Slav Treaty Suitable provisions will be made in the case of Musalmans for regulating family law and personal status in accordance with Musalman usage (Art. 2 Para [illegible]

‡ Art 5 P[illegible]

Albania. Naturally the demands were opposed by Albania* and rejected by the League.

Finland's declaration giving Autonomy to the Aaland Islands

The Finnish Government's declaration regarding the Aaland Islands bears some resemblance to the Czecho-Slovak Treaty in so far as it affected the Ruthene territory in the matter of administrative devolution † The Aaland Islands were mainly populated by the Swedish, but they were, from the geographical point of view, inseparable from Finland. They could not therefore be created into a separate State Hence the provision for a large measure of local autonomy for the Islands under the general jurisdiction of the Finnish mainland When the Law of Autonomy for the Islands was passed, the Islanders pointed out that it left a great loophole in that it did not provide safeguards against denationalisation The argument apparently weighed with the League Commission

The League Commission's Award makes detailed provisions regarding franchise, distribution of taxes and appointment of public servants

An Award was then made by the Commission which was accepted in the form of an agreement between Sweden and Finland It supplemented and, to some extent, corrected the law of autonomy

In the law of autonomy for the Islands of May 7th, 1920, elaborate provisions for the protection of the Islanders were inserted under the League of Nations on the 20th of June, 1921 Article 2 lays down that the Landstig and the Communes of the Islands shall, in no circumstances, be obliged to maintain or subsidise any schools other than those in which Swedish is the medium of instruction. In State educational establishments education will be imparted through the Swedish tongue Without the consent of the Communes concerned the Finnish language shall not be taught in primary schools maintained or subsidised by the State This provision goes beyond the general guarantees under the Minorities Treaties, for according to the latter the Governments are empowered to make the use of the language of the majority obligatory in

* Report of the British Representative to the Council, October 2, 1921

† Monthly summary of the League of Nations, Vol I, pp 40 42

schools while offering facilities for the use of the minority languages * There is sufficient reason for this departure from the normal practice in the Succession States The Islands constitutes an autonomous unit and naturally any Finnish interference with the exercise of its linguistic rights might have been viewed with considerable suspicion

The Islands extended under Article 4 Provincial and Communal franchise to all persons domiciled there the Award stipulated that the franchise might be acquired by immigrants on the completion of five years legal domicile and not otherwise, thereby removing the possibility of Islanders being ever swamped by non resident settlers from Finland Domicile in Finland does not mean domicile in the Islands Great Britain which has evolved Dominion autonomy and is pledged to the policy of political relaxation in different parts of the Empire would do well to bear in mind this provision when she demands the rights of citizenship for her nationals throughout the Empire Then again, the Islanders (Article 3) were given the right of pre-emption *in cases where landed property was offered for sale to outsiders* The same right of pre-emption was extended to the Provincial Council or the Commune in which the real estate was situate Further the appointment of the Governor of the Islands was not at the *absolute disposal of the Government of Finland it was* arranged that the appointment would be made by the head of the Finnish Government *in consultation* with the *President of* the Aaland Landstig † The law of autonomy (Article 21) gave the Islands special powers of raising taxes in addition to the general State tax, under the control of the Finnish Government The provision, it was pointed out, was meaningless in view of the extremely heavy scale of State tax The Award has sought to solve the difficulty by *laying down that fifty per cent* of the tax raised in the Islands (Article 6) would be allocated to the Government of the Islands The Award by the way may be of some use

* *Cf* Art. 9 of the Polish Treaty Art 10 of the Roumanian Treaty Art 9 of the Yugo-Slavian Treaty Art 9 of the Czecho-Slovakian Treaty and Art 9 of the Greek Treaty

† Article 5

to those who in India are engaged in discovering a scientific and equitable formula for the distribution of financial resources between the Federal Government and the Provinces under the new constitution.

Lithuania, Latvia, and Esthonia were admitted to the League in 1921 On admission each of them signed a declaration stating that it would take the League Council into its confidence in regard to the protection of minorities Lithuania promptly carried out the promise by making a declaration in May, 1922, accepting the principles laid down in the Minorities Treaties.

It may be recalled in this connection that the Assembly of the League of Nations adopted the following resolution on December 15, 1920 .

> "In the event of Albania, Baltic and Caucasian States being admitted to the League, the Assembly requests that they should take the necessary measures to enforce the principles of Minorities Treaties, and that they should arrange with the Council the details required to carry this object into effect "

Before the admission, on September 22nd, 1921, of Lithuania, to the League of Nations, her representative signed a declaration on September 14, 1921, in accordance with which the Lithuanian Government accepted the recommendation made by the League Assembly on December 15, 1920, which has been referred to above Lithuania's declaration before the Council of the League, dated the 12th of May, 1922, was therefore made in accordance with her previous declaration and the terms of the Assembly resolution of the 15th of December, 1920 The declaration is divided into nine articles, all of which save 7 and 8 deal with general provisions for the protection of minorities being identical in language and intent generally with the corresponding safeguards embodied in different Minorities Treaties Articles 7 and 8 contain specific provisions for the Jewish Minorities resident in Lithuania Article 7 lays down that the Education Committees appointed locally by the Jewish communities of Lithuania will, subject to the general control of the State, provide for the allocation of a proportional share of public funds to the Jewish schools in accordance with Article 6, and for the organisation and

The text of the Lithuanian Declaration and its implications in law

management of those schools The provisions of Article 6 concerning the use of languages in schools shall apply to those schools The Jews are therefore entitled to demand in towns and districts, in which they constitute a considerable proportion of the citizens that adequate facilities should be given ensuring that in the primary schools instruction shall be given to their children through the medium of their own language Here as in almost all other Minorities Treaties the State concerned reserves to itself the right of making the teaching of the State language obligatory in the said schools Article 8 provides that the Jews shall not be compelled to perform any act which constitutes a violation of their *sabbath* nor shall they be placed under any disability by reason of their refusal to attend Courts of law or to perform any legal business on their *sabbath* This provision shall not exempt them from such obligations as shall be imposed upon all other Lithuanian citizens for the necessary purposes of military service national defence or the preservation of public order Lithuania further declares her intention not to order or permit elections, whether general or local to be held on a Saturday nor on that day will registration for electoral or other purposes be compelled to be performed

At a meeting of the Council of the League of Nations held on December 11, 1923, M Galvanauskas submitted a note on behalf of the Lithuanian Government In that note the Seimas expressed the opinion that *the Lithuanian Government s declaration* did not fall under the terms of Article 30* of the Lithuanian Constitution within the category of those international acts which in law required ratification and that the Lithuanian Government alone was qualified to bind the action of Lithuania within the limits fixed by the declaration It was also made clear in the Report that the Lithuanian Government took the occasion to renew before the Council of the League its undertaking strictly to conform to the terms of the declaration of the 12th of May, 1922 The *Council of the League accepted on M De Souza*

* Art. XX. Seimas ratify the following State Treaties concluded by the Government Peace Treaties, Treaties concerning the acquiring relinquishing or ceding of State territory commercial Treaties with other States foreign loans Treaties entirely or partially abrogating or modifying existing legislation Treaties imposing obligations upon Lithuanian citizens Treaties involving monopoly rights direct or indirect or rights of expropriation.

Danta's motion the undertaking given by the representative of the Lithuanian Government, and the question was settled.

But there was no plain sailing, so far as Latvia and Esthonia were concerned The principal arguments put forward by Latvia against international guarantees of the kind imposed on other States were three It pointed out, in the first place, that no State already recognised could be bound down by the Treaties In the second place, it was urged that the Minorities Treaties were no part of international law as defined and understood and that Latvia could not be subjected to those Treaties unless all the members of the League accepted them Lastly, it held that the protection of minorities "went beyond the rights assigned to the League by the Covenant."*

Latvia stands against international guarantees an understanding arrived at Latvian Minister's statement before the Council

The objections, however, did not stand and in July, 1923, an understanding was arrived at under which the Latvian Minister at Rome made a statement before the Council accepting the broad principles of the Minorities Treaties In the course of his speech M Walters said :†

"Considering that the regulation of the question of minorities in Latvia must take into account the constitution and sovereign rights of the Latvian State, as well as the social necessities and in view of the fact, that Latvia has of its own free will taken adequate measures to protect its minorities, and further in view of the fact that different aspects of the question of the protection of minorities in Latvia are still being examined by the Latvian Government, I have the honour to propose that the negotiations between the Latvian Government and the Council of the League of Nations should now be terminated The Council will nevertheless have the right to take up the question anew and to reopen the negotiations if the situation of the minorities in Latvia does not appear to it to correspond to the general principles laid down in the various so-called Minorities Treaties The Latvian Government can on its side also demand that negotiations should be re-opened

* Miss Mair The Protection of Minorities, p 55
† Doc A 22, 1923, I,

I further propose that these petitions which may from this date be addressed to the League of Nations concerning the situation of persons belonging to racial linguistic or religious minorities in Latvia be transmitted to the Latvian Government for its observations It is obvious that the Secretariat of the League of Nations will be careful to put aside those petitions which come from anonymous or unauthenticated sources or which are couched in violent language Petitions which are recognised as being admissible together with such observations as the Latvian Government may desire to present will be communicated for information by the Secretary General to the Members of the Council

The Latvian Government accepts in principle from this date the obligation to furnish the Council with any information which it may desire should one of its members bring before it any question relating to the situation of persons belonging to racial linguistic or religious minorities in Latvia

In case of a difference of opinion on questions of law or of fact concerning the present declaration the Latvian Government reserves the right to ask that the difference of opinion be referred to the Permanent Court of International Justice for an advisory opinion It should be clearly understood that the Council will also have the right to ask for the question to be referred to the Court

In view of the fact that M Walters made the proposals as embodied in his declaration subject to the consideration and final approval of the Government he represented at the Council of the League of Nations the latter adopted the following resolution

The Council of the League of Nations takes note of the declaration made by the representative of Latvia and is ready to accept the proposals contained therein provided that the Latvian Government informs it before the next session of the Council that it approves the declaration of its representative

The Secretary General shall communicate this decision to the Assembly of the League of Nations for its information

In the telegram dated the 28th of July 1923 the Latvian Government declared that it accorded its entire approval to the statement made by its representative on July 7 of the same year This brought to a close the controversy between the League and Latvia with regard to the proposal for providing minorities safe-

guards in Latvia under the auspices of the League of Nations. It may be noted that the Latvian Minister's declaration not only contains in general terms guarantees in regard to the protection of minorities but also indicates the manner and extent of League supervision and control. That is perhaps due to the fact that already, apart from the provisions in the Minorities Treaties, the League had established by resolutions the procedure of its supervision and control.

It is necessary to note here that Latvia had already done much to give protection to its minorities. The constitution of November, 1918, for example, gave the country universal suffrage with proportional representation and voting by secret ballot. The right of association was assured by Kerensky to all Latvian citizens irrespective of their language and religion. Provision was made for the imparting of primary education through the medium of the mother-tongue of the children and for representation of minorities on the local Educational Committees in places where there were minority schools.

The constitution of Esthonia gives protection to minorities in respect of languages and religious institutions and provides for autonomous local bodies.

The Esthonian Government claimed that their constitution itself contained more than adequate provisions for the protection of minorities. They were, therefore, not prepared to acquiesce in any intervention by the League. In this connection reference may be made to the constitution of the Esthonian Republic adopted by the Constituent Assembly on the 15th of June, 1920. The Constitution lays down that all citizens of the Republic are equal before the law.* It guarantees personal liberty to them and further provides that no person shall be prosecuted except in accordance with the procedure prescribed by law.† It gives to the citizens complete freedom of religion and conscience who cannot be forced to perform any irreligious act or to become members of any religious association or to pay for its maintenance.‡ It provides however that religious be-

* Art. 6.

† Art. 8.

‡ Art. 11. Compare the provisions in the Government of India Act, 1935, relating to the Ecclesiastical Department under which not only is that Department reserved but

lief may not be pleaded in justification of the non fulfilment of civic duties It guarantees to all racial minorities that instruction in primary schools is to be imparted through the medium of the mother tongue of the children at State expense * Racial minorities have the right to establish autonomous institutions for the preservation and development of their national culture and to maintain special organisations for their welfare But the exercise of that right must not be incompatible with the interests of the State † The saving clause the interests of the State may be used by the executive authorities not well-disposed towards the national minorities to nullify for all practical purposes the protection guaranteed in the constitution a point which cannot be overlooked in view of recent developments in dictatorship in Europe It lays down that in districts where the majority of the population is not Esthonian the self governing institutions may use in their administration of public activities the language of the racial minority who predominates in the areas concerned Every citizen has however the right to use the language of the State in his dealings with the local authorities ‡ Further the local self governing bodies using the language of a racial minority are required to make use of the national language in their communications with the Government and local bodies which do not *speak the language of the same racial minority* § *Citizens of German* Russian or Swedish speech have the right *to address the* Government in their own languages The use of those languages in courts of law and in dealings with local bodies is to be regulated by special laws || Then the Esthonian Code of criminal law treats inducement or persuasion brought to bear upon any person *to forego his minority rights as a penal offence*

the Christian religious establishments are made a charge on the Federal revenues. These however introduce no new principle or policy the system is a legacy from the East India Company for spiritual ministrations at St te expense to troops and civilians 25 and 26 Geo 5 Ch 42 ss 11 and 269

* Art. 12.

† Art 21

‡ Art. 22

§ Art. 23.

|| Art. 45 (a)

Esthonia refuses to accept the League guarantees and states reasons an agreement ultimately reached and it makes a declaration

The second argument raised by Esthonia against League intervention was that the minority rights forming part of the constitution could not be rendered liable to supervision by the Powers without infringing the internal sovereignty of the Esthonian State The answer was that the special articles dealing with the protection of minorities could be incorporated in a separate document thus leaving the constitution in no way affected The third argument put forward was that the problem of protection was not very important in Esthonia inasmuch as its minorities were rather too small It was suggested *inter alia* that if any modifications were proposed to be made seeking to infringe the rights of the minorities guaranteed in the constitution, it would then be for the League Council to intervene It was pointed out in reply on behalf of the League that the proposal would give the Council no legal title to intervene as there was no Treaty to justify such intervention and would give rise to an anomalous position Again the proposal, if accepted, would give the Council no right to intervene except when modifications of the constitution were under contemplation or effected The Council, it was stated, would be powerless if the provisions in the Constitution were ignored by the Government Thus in Esthonia's case also the objections failed And in September 1923, at the meeting of the League Council, a resolution was adopted to which Esthonia agreed and which was followed up by a declaration on its behalf * The resolution and the declaration cover all the points and principles embodied in Latvia's declaration accepted by the League

The resolution reads as follows

I "The Council of the League of Nations notes the information on the status of racial, linguistic and religious minorities in Esthonia, which has been furnished by the Esthonian representative in his Report of August 28, 1923, in accordance with which the protection of minorities in Esthonia is at present guaranteed under the Esthonian constitution in a manner which conforms to the general principles governing the protection of minorities

* O J, November, 1923

II The Council will be entitled to consider afresh the status of minorities in Esthonia should the latter cease to enforce those general principles according to the recommendations of the Assembly of the League of Nations dated December 15 1920

For this purpose the Council may request the Esthonian Government to supply it with the information which it may require on any question regarding the conditions of persons belonging to racial linguistic or religious minorities which may be submitted to it by one of its members

III In the event of any difference of opinion on questions of law or of fact in regard to this resolution such difference of opinion may be referred to the Permanent Court of International Justice for an advisory opinion

On this resolution M Pusta representing the Government of Esthonia at the Council of the League of Nations made the following declaration

> I have the honour on behalf of my Government to accept the text of the resolution submitted to the Council regarding the protection of minorities in Esthonia

It is understood that the Council will not ask the Esthonian Government for information regarding the conditions of persons belonging to racial linguistic or religious minorities unless the question has been submitted to the Council by one of its members

Furthermore the Esthonian Government desires to make it clear that any information forwarded to the League of Nations must in the first instance, be communicated to it by the Secretariat, except in the case of any communication couched in violent terms or emanating from an anonymous or unauthenticated source, especially if there is reason to suppose that these communications come from a country other than Esthonia which must simply be disregarded by the Secretariat

Only those communications which are recognised as acceptable together with any observations which the Esthonian Government might consider it desirable to make thereon, would be forwarded for information to the members of the Council Care was taken to emphasise that

> In addition it must be clearly understood that this declaration forms together with the resolutions submitted to the Council

an indivisible whole which must not, however, be regarded as constituting a Minorities Treaty "

On the motion of M. De-Rio-Branco the Council took note of the declaration and accepted the proposals contained therein

In this case also as in that of Latvia the procedure of League supervision and control was indicated as also the considerations which should determine the admissibility of petitions submitted to the League in regard to the protection of minorities.* The main argument put forward by Temperley seeking to justify the exclusion of Western European countries from the purview of the League in respect of the protection of minorities was that those countries had already developed the principles of constitutional government and as such required no League safeguards for the purpose. It will be seen that the first paragraph of the League resolution makes a clear admission that the Council of the League is not only aware of the provisions for minorities protection embodied in the Esthonian constitution but also recognises the fact that those provisions conform to the general principles governing the protection of minorities If, therefore, Temperley's argument is accepted, the League should have no justification for interfering with the internal arrangements of a sovereign State The fact, however, is that the League was inspired by considerations other than those pointed out by Temperley Now, as regards the last part of M Pusta's declaration, we cannot appreciate the difference it seeks to make out between the declaration and a Minorities Treaty Generally, the provisions in both are practically similar Their implications are identical and the incidence from the legal or constitutional standpoint is the same The fact that Esthonia is bound by a declaration and not by a Treaty does not absolve her from liabilities and responsibilities incidental to the Minorities Guarantee Treaties

The arrangements in regard to the protection of minorities in Upper Silesia, in the Free City of Danzig and in the Free Port of Memel, were not effected by means of Minorities Treaties or by Declarations but by means of what is called Convention

* The Minorities Treaties do not mention petitions Only the German-Polish Convention relating to Upper Silesia contains provisions regarding them See Part III, Division III, of the Convention

According to the Versailles Treaty Upper Silesia was to be divided between Germany and Poland in consonance with the desire of the majority of the population expressed through a general plebiscite A special difficulty was encountered in attempting to carry out the provisions of the Treaty in that regard Upper Silesia contains an industrial district composed of three principal towns and mainly inhabited by Germans and a country side in which the inhabitants are principally Polish Any partition would therefore leave the German towns isolated in the middle of the territory and an *ad hoc* scheme of partition therefore was considered impracticable Besides the territory was economically a unit and it was not at the same time possible to assign it either to Germany or to Poland without violating the principles of self determination enunciated by President Wilson and sought to be enforced at the Conference of Paris In the circumstances a plebiscite was considered inevitable for it was thought that such a step would give less cause for dissatisfaction The Supreme Council, however, failed to agree as to the manner in which the plebiscite was to be taken The Council therefore accompanied its recommendation as to the actual boundary to be adopted with a suggestion that during a transitional period of fifteen years the economic relations of the two parts of the district and the treatment of minorities should be regulated by a special Convention between Germany and Poland *

Special provisions for Upper Silesia by a German Polish Convention

The Conference of Ambassadors decided† on October 20 1921 that the Treaty with regard to the protection of minorities concluded between the Allied and Associated Powers and Poland on the 28th of June 1919 should be applicable to those parts of Upper Silesia definitely recognised as part of Poland that the principles of equity and maintenance of the economic life of Upper Silesia demand that the German Government should be bound to accept at least for the transitional period of 15 years dating from the definitive allocation of the territory stipulations corresponding to Articles 1 12 of the Polish Treaty as regards

* Miss Mair: The Protection of Minorities p 58.
† O L 1927 I Annexe pp 65-67

those parts of Upper Silesia definitely recognised as part of Germany, and that the provisions of the agreement to be concluded between the German and Polish Governments in order to put into force the above-mentioned principles, constitute obligations of international concern for Germany and Poland and shall be placed under the guarantee of the League of Nations in the same way as the provisions of the Polish Treaty[*]

Then the contracting parties, *viz*, Germany and Poland, agreed to sign a convention for the protection of minorities in both the German and Polish parts of Upper Silesia The Convention is the most comprehensive document on the subject of minorities protection consisting as it does of about 100 articles It is classified into three divisions The first division contains provisions corresponding to those made in the Polish Treaty as has been pointed out in a preceding table The second division analyses in detail the provisions made for the linguistic, religious and racial protection of minorities This division again is subdivided into five chapters The first chapter deals with general provisions (Arts 73-74) The second chapter deals with civil and political rights (Arts 75-83) In the third chapter are enumerated safeguards with regard to religion (Articles 84-96) The fourth chapter is devoted to the enumeration of educational safeguards (Arts 97-130) Detailed provisions are made in this chapter for (I) Private Education, (II) Public Elementary Education, (III) Vocational Training and Extension Classes, (IV) Secondary and Higher Education and (V) General Provisions The fifth chapter deals with safeguards in regard to the official language of administration and the language employed in legal proceedings The third division enumerates provisions dealing with the right of petition and methods of appeal

Of peculiar importance is Article 64 of the Convention under which the German Government accepts for the transitional period of 15 years the Minority provisions as being applicable in the German portion of the plebiscite territory while the obligation imposed upon Poland in this regard in so far as the Polish part of Upper Silesia is concerned is of a permanent character This

* *Supra*, pp 46-47

differential treatment as between Germany and Poland it is extremely difficult to justify If Germany could be depended upon, on the expiry of 15 years, as stipulated in the Convention, to behave with regard to the protection of her minorities, why not Poland? The only consideration which seems to have influenced the Conference of Ambassadors in according preferential treatment to Germany appears to us to be that the Allied and Associated Powers hesitated for obvious reasons to treat on terms of equality such an old and powerful State as Germany and a newly created State as Poland Another reason was that the Allied and Associated Powers thought it necessary to placate Germany, especially in view of the fact that extensive German territories had already been taken from her and given over to Poland These are the considerations also which had moved the Conference at Paris in excluding Germany from the purview of the League altogether As it is, this discriminatory treatment seems to have given cause for offence to Poland and led to many troubles in the plebiscite territory—a subject which is discussed in some detail in Chapter VI

Minorities Treaties are followed practically in all their details

The Convention deals with the Fundamental rights the acquisition of nationality religious rites and observances private education and public elementary education the use of minority languages and, lastly the right of petition and method and procedure of appeal It is laid down that all German and Polish natives shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race language or religion * Legislative and administrative provisions shall not establish any differential treatment of nationals belonging to a minority Nor shall they be so interpreted as to give an opportunity to the Government to discriminate against any such persons Nationals belonging to minorities shall not be placed at a disadvantage in the matter of free exercise of franchise notably in the case of a referendum, and of eligibility for election to representative Assemblies of the State as well as for election to other public bodies † The Convention guarantees equality of status and treat

* Art 75 † Art 76.

ment to all nationals regarding admission to public employments * Minorities are given the right to form associations and create foundations † They have the same rights as other nationals as regards the exercise of agricultural, commercial or industrial callings or any other calling ‡ They shall be subject only to those restrictions which are or may be applicable to other nationals This article constitutes a clear and definite safeguard against commercial or economic discrimination as between a citizen and a citizen—a principle of public law which has in India given rise to a heated controversy between Indians and European British subjects They enjoy the right to establish, manage and control at their own expense charitable, religious or social institutions § Full and complete protection of life and property is assured to all the inhabitants of the district without distinction of party, nationality, language, race or religion || They are entitled to the free exercise, whether in public or private, of any creed, religion or belief, the practices of which are not inconsistent with public order ¶ They are free to employ the language of their own choice in all affairs of the internal administration of religious institutions ** With regard to private education, minorities are entitled to establish, manage and control at their own expense private schools and private educational establishments †† The official language cannot be imposed as the medium of instruction in such private primary schools ‡‡ Regarding public elementary education, provisions made are more detailed and specific The needs of minorities in respect of public elementary education are sought to be met through the following educational institutions

(*a*) Elementary schools employing the minority language as the language of instruction—*i e*, minority schools;

(*b*) Elementary classes employing the minority language as the language of instruction, established in the elementary schools employing the official language—*i e*, minority classes,

* Art 77 † Art 78 ‡ Art 80 § Art 81
|| Art 83 ¶ Art 85 ** Art 86 †† Art 98 ‡‡ Art 99

(c) Minority courses including (1) Teaching of the minority language (Minority language courses) (2) Religious teachings in the minority language (Minority religious courses)

Educational safeguards.

The authorities for instance are bound to establish a minority school in any place where an application to that effect is made supported by persons legally responsible for the education of forty children of a linguistic minority If forty of these children belong to the same religion, the State must give them on application a denominational school If however for grave and sufficient reasons, such schools are not established, minority classes for teaching the language and religion of minorities must be provided for * Minority language classes are to be established provided an application is made for same supported by persons legally responsible for at least eighteen pupils The number is reduced to twelve in the case of minorities religious classes † Almost identical provisions are made for secondary and higher public education (Art 117) Minorities schools are assured of a share, proportionate to the number of their pupils of the funds allocated out of the budgets for the ordinary maintenance of elementary schools apart from general administrative expenses and grants in aid ‡ Provision is made for adequate representation of minorities on the School Committees and for the establishment of secondary and higher schools for minorities under certain conditions It is laid down that where State secondary schools exist the Government must provide similar schools for linguistic or religious minorities upon the demand made by guardians of at least three hundred children With a view to ensuring a sufficient supply of teachers for the educational institutions of linguistic minorities the contracting parties have adopted the following measures

1 As a general rule only teachers belonging to the minority and perfectly acquainted with its language shall be appointed to minority schools Language courses shall be established for

* Art 106. † Art 107 ‡ Art 110

teachers appointed or about to be appointed to minority schools who are not sufficiently acquainted with the minority language

2 A sufficient number of institutions shall be established, in conformity with the legislation of the State concerned, for the general training of future teachers, in which the language of instruction shall be minority language

3 The diplomas required of a teacher for appointment to a public elementary school of one of the contracting States shall be sufficient to qualify him to act as teacher of the minority in the portion of the plebiscite territory belonging to the other State The acquisition of that State's nationality may nevertheless be required (Art 113) *

Special provisions for Jews

Articles 70 and 71 deal with provisions for the protection of Jews in either part of Upper Silesia Education Committees appointed locally by the Jewish communities are to provide for the distribution of the proportional share of public funds allocated to Jewish schools in accordance with Article 69, and for the organisation and management of those schools Provisions in Article 69 concerning the use of languages in schools shall apply to those schools It is further laid down that Jews shall not be compelled to perform any act which constitutes a violation of their *sabbath*, nor shall they be placed under any disability by reason of their refusal to attend courts of law or to perform any legal business on their *sabbath* This, however, shall not exempt Jews from such obligations as shall be imposed upon all other citizens for the necessary purposes of military service, national defence, or preservation of public order Both Germany and Poland declared their intention to refrain from ordering or permitting elections, whether general or local, to be held on a Saturday, nor will

* In educational matters the German Polish Convention, it is thus clear, goes very much beyond the terms and provisions of the other European Minorities Treaties, although in Hungary, according to the laws passed in 1923 24, some attempt has been made to follow the German-Polish precedent It is provided that minorities schools are to be opened in districts where either the majority of the population belongs to a linguistic minority or where there are at least fifty children speaking the minority language

registration for electoral or other purposes be compelled to be performed on a Saturday

Ample consideration is shown to the languages of minorities in their individual economic relations and in their collective relations No restriction is imposed on the use of minority languages in the Press and in publications and at public or private meetings * In verbal relations with the civil authorities of the plebiscite territory, all persons are entitled to use either the German or the Polish language † Petitions addressed to the civil authorities may be drawn up either in German or Polish Replies by those authorities and all official communications are to be made in the official language A translation in the minority language is however required to be attached to the replies and official communications (Articles 136 139) Subject to the regulations concerning the use of the official language and in particular, the language in which minutes motions etc must be drawn up, nationals belonging to minorities may speak in their own language in the *Kreistag* in the *Sejmik Powiatowy* and in the municipal and communal Councils of the territory The same shall apply to the *sejm* of the *Voivodship* of Silesia and the *Provinziallandtag* of Upper Silesia for four years from the date of transfer of sovereignty (Article 138)

Linguistic Safeguards

In the ordinary courts of the territory any citizen is entitled to use verbally or in writing either the German language or the Polish language instead of the official language In the case of necessity that part of the court proceedings which is not conducted in the official language is translated by the President of the court or by one of its members or by an interpreter appointed by the court The court is to decide whether it is advisable to insert in the records or as an annex statements or evidence produced in a minority language or to attach to the records a translation certified by the interpreter But no minority is entitled to insist that an annexed record should be drawn up in its language (Article 140) The Minister of Justice may decree that complaints, petitions, or

* Art. 134. † Art. 135

other declarations of the party drawn up in a minority language and officially notified *ex-officio* must be accompanied by the number of copies necessary for such notification (Art 141) The official notification of complaints or other documents, relating to a case drawn up in the minority language, shall only be valid if it is made in the other State or in the plebiscite territory If the notification in the minority language is without effect and if official notification is made *ex-officio*, a translation of the complaint or document in question must be arranged for by the court and forwarded for purposes of notification A copy of the original must be attached and the notification of the translation must in this case have the same effect as a valid notification of the document translated (Article 146) Without prejudice to the provisions of Article 146 applications for entries in the land register or other registers kept by the courts, as well as declarations of consent relating to them must, if they are drawn up in the minority language, be accompanied by a translation by a sworn interpreter, whose text shall be taken as authentic in case of divergence (Article 143) In the ordinary courts of the territory the Polish language may, if they deem necessary, be employed in the debates in the German part and the German language in the Polish part provided that the parties, witnesses and other persons concerned, understand it sufficiently Judgments, however, have to be delivered in the official language and the records shall be drawn up also in that language A considerable amount of discretion is given to the courts as regards the questions of using the minority language for the purpose (Art 144) Article 146 makes it clear that the provisions contained in this section of the Convention in no way invalidate any regulations which have already been issued, or which may hereafter be issued, authorising in still larger measure the use of the Polish language in the German part or the use of the German language in the Polish part

The articles in the Convention relating to the use of the minority languages in legal proceedings and in deliberative assemblies will not appear strange to those who are acquainted with the conditions prevalent in different parts of India In this country, as is pointed out in Chapter XVI, a good deal of latitude is given to minorities for the use of their vernaculars in

the proceedings of the courts, particularly of the lower grade and in the Provincial Legislative Councils *

The Greco-Bulgarian Convention which came into force with effect from August 9, 1920, and the Greco-Turkish Convention which was signed at Lausanne on January 30, 1923, raise issues different from those dealt with in the Minorities Treaties, Declarations and other Conventions These two Conventions contain provisions for reciprocal emigration and exchange of populations The Greco-Bulgarian Convention contains sixteen articles and the Greco-Turkish Convention contains nineteen articles They not only provide for the exchange of populations under certain conditions but also for the specific manner in which exchanges are to take place

In Article I of the former it is laid down that the High Contracting Parties recognise the right of those of their nationals who belong to racial religious or linguistic minorities to emigrate freely to their respective territories The Contracting Parties undertake to facilitate the exercise of that right and not to place directly or indirectly any restriction on the right of emigration, notwithstanding laws or regulations to the contrary which, in this respect shall be considered null and void The exercise of the right of emigration is not to affect the pecuniary right of the emigrants such as those that may exist at the time of emigration (Article 2) No obstacle is to be placed in the way of the departure of a voluntary emigrant for any reason whatsoever save in the case of a final sentence to imprisonment for violation of ordinary law In the case of a sentence which is not yet final, or of penal proceedings under ordinary law against an emigrant he shall be handed over to the authorities of the country to which he is emigrating for the purpose of his trial (Article 3) The right of voluntary emigration belongs to every person who is over eighteen years of age

The Greco-Bulgarian Convention and provisions for exchange of populations.

* It seems that the Indian vernaculars have not been fairly treated *vis-a-vis* the English language in respect of proceedings in the legislatures *Cf* 25 and 26 Geo V Ch 42, ss. 39 and 85

A declaration of intention to emigrate on the part of a husband shall amount to a declaration by his wife and a similar declaration on the part of parents or guardians shall imply a declaration by their minor children or wards (Article 4) An emigrant shall lose the nationality of the country the moment he quits it and shall acquire that of the country of destination from the moment of his arrival there (Article 5). He is entitled to take with him or to have transported his movable property of every kind without any export or import duty being levied from him on account of transfer Similarly where the right of emigration is exercised by members of communities (including churches, convents, schools hospitals or foundations of any kind) the Mixed Commission, appointed in accordance with the provisions of Article 8, is to determine whether and in what circumstances such persons shall have the right to take with them the movable property belonging to the communities (Article 6)

The Mixed Commission is charged with the duty of liquidating real property rural or urban, belonging to voluntary emigrants or to the communities referred to above, it having full power to have a valuation made of real property, and the interested parties being entitled to be heard or to be duly summoned to a hearing The Government of the country where the liquidation takes place shall pay to the Mixed Commission, under conditions to be fixed by the latter and for transmission to the parties concerned, the value of the real property liquidated, which property shall then belong to the said Government (Articles 8 and 9) Persons who before the entry into force of the present Convention have left the territory of one of the contracting States and have already established themselves in the territory of the State to which they belong by race, religion or language, shall have title to the value of the property left by them in the country which they have quitted, the value of the liquidated property being determined by a Mixed Commission (Article 12)

The Mixed Commission shall be composed of one member nominated by each of the contracting States and of an equal number of members of a different nationality, from among whom also the President shall be chosen The President shall,

moreover, be nominated by the Council of the League of Nations. The decisions of the Commission shall be by majority, the President having the casting vote. Its function is to supervise and facilitate the voluntary emigration contemplated in the Convention, to liquidate the real property of emigrants and to fix the conditions of emigration and liquidation of real property. In short, it shall have full power to take measures necessary for the execution of the Convention and decide all questions to which the Convention may give rise (Articles 8 and 9). The expenses of the maintenance and working of the Commission and its agencies shall be borne by the Governments concerned in proportions to be determined by the Commission (Article 13).

Provisions for compulsory exchange in the Greco-Turkish convention safeguards against double nationality and Statelessness.

In the Greco-Turkish Convention, however, provision is made for a compulsory exchange of Turkish nationals of the Greek Orthodox religion established in the Turkish territory and of Greek nationals of the Moslem religion established in the Greek territory. Such persons are not entitled to return to live in Turkey or Greece respectively without the permission of the Turkish Government or of the Greek Government respectively (Article 1). The Greek inhabitants of Constantinople and the Moslem inhabitants of Western Thrace are persons not to be included in the exchange (Article 2). Those Greeks or Moslems who have already and since the 18th October 1912 left the territories the Greek and Turkish inhabitants of which are to be respectively exchanged shall be considered as being included in the exchange (Article 3). No obstacle may be placed for any reason whatsoever in the way of the departure of a person, as in the case of the Greco Bulgarian Convention, belonging to the populations which are to be exchanged. Again, on the Greco Bulgarian analogy, in the event of an emigrant having received a definite sentence of imprisonment or a sentence which is not yet definitive, or of his being the object of Criminal Proceedings, he shall be handed over to the authorities of the country to which he is proceeding in order that he may serve the sentence passed on him or be brought to trial (Art. 6). The emigrants will lose the nationality of the country which they are leaving and acquire the nationality of the country of their des

tination on their arrival in the territory of the latter country The Convention, therefore, seems to have provided a safeguard against the acquisition of double nationality and the entire extinction of nationality on the part of the minorities concerned,—issues which have on occasion given trouble to the League and rendered claims of certain minorities to protection of doubtful legal validity It is provided, for example, that such emigrants, as have already left one or other of the two countries, *viz* , Greece and Turkey, and have not acquired their nationality, shall acquire that nationality which they enjoy on the date of the signature of the Convention (Article VII)

As in the case of the Greco-Bulgarian Convention, so in the Greco-Turkish Convention, emigrants are entitled to take with them or arrange for the transport of their movable property of every kind without being liable for payment of any export and import duty This right is likewise conferred on the members of each community (including the personnel of mosques, tekkes, meddresses, churches, convents, schools, hospitals, societies, associations and juridical persons or other foundations of any nature whatsoever) that leave the territory of one of the contracting States under the present Convention There is also provision for the liquidation of the movable property left by them, the emigrants in question being given an opportunity to be heard on the question of valuation for the liquidated property (Article VIII) Immovable property, whether rural or urban, belonging to emigrants or to juridical persons mentioned in Article VIII, as also the movable property, left by these emigrants or communities, are to be liquidated in accordance with the provisions laid down in Article XI * (Article IX)

* "Within one month from the coming into force of the present Convention a Mixed Commission shall be set up in Turkey or in Greece, consisting of four members, representing each of the High Contracting parties, and of three members chosen by the Council of the League of Nations from among nationals of Powers which did not take part in the War of 1914 1918 The Presidency of the Commission shall be exercised in turn by each of these three neutral members

"The Mixed Commission shall have the right to set up, in such places as it may appear to them necessary, Sub Commissions working under its order Each such Sub Commission shall consist of a Turkish member, a Greek member, and a neutral President to be designated by the Mixed Commission The Mixed Commission shall decide the powers to be delegated to the Sub Commissions"

Functions of the Mixed Commission.

It is the duty of the Mixed Commission contemplated in Article XI, to supervise and facilitate the emigration provided for in the Convention and to carry out the liquidation of the movable and immovable property of the transferred populations to settle the methods to be followed as regards emigration and liquidation and in a general way to exercise the power vested in it to take measures necessitated by the execution of the Convention and to decide all questions to which it may give rise All disputes relating to property, rights and interests which are affected by liquidation shall be settled definitely by the Commission The decisions of the Mixed Commission must be taken by majority It is also its duty to cause the valuation to be made of the movable and immovable property liquidated under the Convention the interested parties being given a hearing on the issues involved (Articles XII and XIII) The total sum due on the basis of the Commission s declaration constitutes a Government debt from the country where the liquidation takes place to the Government of the country in which the emigrants finally settle down Emigrants are in principle entitled to receive in the country to which they emigrate, as representing the sum due to them, property of a value equal to what they have left behind and generally of the same nature (Art XIV) With a view to facilitating emigration the States concerned are under an obligation to place funds at the disposal of the Mixed Commission under conditions which the Commission alone will be competent to lay down The expenses involved in the maintenance and working of the Commission and of the various organisations dependent on it shall be borne by the Governments of the countries which are parties to this Convention in proportions to be determined by the Commission All these sum up the substance of the provisions contained in the Convention both as regards its substantive and procedural parts

Objections to the principle of compulsory exchange of populations.

Now, while there may be little objection on principle to voluntary emigration the system of compulsory emigration as provided for in the Greco Turkish Convention is not absolutely free from evils The State or States concerned may under the Convention force minorities to leave places where they

might have created large interests It is, moreover, just likely to put the State to which migrations take place in a very difficult and unenviable position As a matter of fact, the emigration of Greeks involved Turkey in a great economic loss since she was forced to take about one million refugees being about one quarter of her entire population Nor can it be asserted with anything like confidence that the policy resulted in a corresponding gain to Greece As Mr Raymond Leslie Buell observes, "the compulsory exchange of minorities not only defies economic laws, but it establishes a dangerous precedent which may act as an incentive to nationalistic oppression"* The system of compulsory exchange should not be allowed to replace other obligations in respect of minorities protection to any considerable extent It cannot be justified except as a last resort for the purpose of meeting emergencies and averting international or inter-racial conflicts There is sense in the view taken by Mr C A Macartney† that the principle of exchange of populations is drastic and fraught with great dangers Where the relations between majorities and minorities are happy and cordial, exchange is unnecessary and would not be demanded by minorities Facts seem to show again that voluntary exchange does not generally take place save under circumstances which, for all practical purposes, amount to coercion The problem is one of great difficulty and complexity and should be sought to be solved only on a full and impartial examination of the circumstances of each case and the delicate issues involved

In the days of the Hanseatic League, Danzig was a Free City, prosperous and powerful and had commercial relations with England It lost its autonomous position and status and became part of the Province of Prussia with the growth of the German Empire It may be recalled that President Wilson insisted as one of his famous Fourteen Points on the recognition of the sovereignty of Poland with direct access to the sea Poland claimed the inclusion of the City of Danzig within her jurisdiction when in accordance with the provisions of the Versailles Treaty she was made an

* Buell International Relations (Revised edition), pp 201 2
† Macartney National States and National Minorities, pp 448 49.

autonomous State But the Allies refused to concede that claim on the ground that it was impossible to hand over a purely German City with a German population to Poland It was, therefore, decided to secure other means of giving to Poland an uninterrupted access to the sea and at the same time to raise Danzig to the status of a Free City under the protection of the League of Nations It was provided that Poland should have the right to free import and export by sea of all Polish requirements

The Port of Danzig is administered by a Board composed of Poles and Danzigers as members and of a neutral President who is a Swiss Colonel appointed by the League of Nations Its railways, customs and foreign affairs are controlled by the Poles The Free City is however, administered by an Assembly of 72 members elected on a broad democratic basis It has developed its own law of citizenship, its own coinage its own Municipal Law Courts and has other visible symbols of an autonomous self-contained State

Provisions for minorities protection in Danzig

It has a population of about 400 000 of which 90 per cent are German The Poles and Danzigers have hardly ever been on friendly terms Poland s allegation is that Danzig has consistently betrayed reluctance to carry out the agreements to which it is a party She thinks that she is not the mistress of her own house so long as a considerable part of her overseas trade goes through Danzig which is outside her control and on that ostensible ground she is engaged in creating a new port in her territory just a few miles from Danzig The Polish claim to Danzig is based not only on economic grounds but also on grounds historical as well as political On the other hand it is difficult to ignore completely the German point of view which is put forward with equal emphasis To cut out of Germany a part of its territory with its long tradition German culture and national life is an unnecessary injustice since arrangements could have been made to grant Poland facilities for a port which would not have required a surgical operation performed as well as Polish interference in their internal affairs *

See Mervyn S MacDonnell in the *Listener*

The Germans who constitute the majority of the population in Danzig are constantly afraid of being Polanized just as the transferred Germans in Tyrol have been sought to be Italianized by Signor Mussolini's drastic and ruthless policy, and so disputes between the parties concerned have been of frequent occurrence It seems to us, however that the cause of suspicion and mistrust should not be so strong as in the case of Italian Tyrol, for the circumstances are not the same Tyrol is under the direct control of Italy while Danzig has been removed as far as possible from the political influence of Poland The disputes in the territory arising between Poles and Danzigers are in the first instance referred to and taken cognizance of by the High Commissioner, who is appointed by the League Council and resides in the Free City The present High Commissioner is a Dane * He was preceded by three British, one Dutch and one Italian High Commissioners Appeals against the High Commissioner's decisions are heard by the Council of the League and, in very complex cases involving intricate points of law, by the International Court of Justice The Nazis are now in power in the City If they respect the provisions of the Convention scrupulously, there is no fear of internal peace being disturbed and of Danzig's autonomous status being vitally affected But much depends on the course of German-Polish relations in Upper Silesia and in other areas which have been carved out of the German Empire and made over to Poland under the Treaty of Versailles †

The Memel territory represented on the Lithuanian Parliament and given local autonomy.

According to the constitution of Memel, there are two parallel official languages established and recognised, namely, German and Lithuanian The Memel territory,‡ like Ruthenia in Czecho-

* According to a Reuter message, dated the 26th October, 1933, Mr Stan Lester, Irish delegate to the League, was appointed High Commissioner for Danzig

† The safeguards embodied in the German-Polish Convention have been practically adopted for Danzig The Danzig Convention contains a special clause prohibiting discriminatory treatment in legislation or administration to the detriment of the nationals of Poland and other persons of Polish origin or speech, in accordance with Article 104 (Paragraph 3) of the Treaty of Versailles (Article 33)

‡ See Arts 5, 9, 11, 16 of the Statute of the Territory and Arts 17 and 27 of the Convention

Slovakia, has its own Council for local affairs and also sends deputies to the Lithuanian Parliament The Governor of the territory is appointed by Lithuania and has the right of veto in all questions The Governor appoints the Memel directorate but the latter must command the confidence of the local Council

Laws of nationality: why they are stated in the Treaties.

Certain points emerge from the analysis made, in the preceding pages, of the provisions in the Treaties, Declarations and Conventions First, the law of nationality has been definitely and clearly laid down in each of those instruments of protection The reasons are obvious As we have seen the territorial changes made after the War resulted in a change of nationality of many peoples Seven States were practically created out of dismemberment of the old States Kingdoms or Empires Six States were radically transformed under the same process The transferred peoples who differed in race, language or religion from the majority of the population inhabiting the Succession States wanted it to be made perfectly clear that they would be freely admitted to the rights and privileges of citizenship of the States to which they were transferred But how could they enjoy the rights and privileges of citizenship unless they were citizens? For it is a well recognised principle of Municipal Law in every part of the world that nationals and aliens are not treated on terms of equality in all matters In certain States of course the aliens enjoy greater rights than in others But the fundamental principle is practically the same everywhere namely that there is some kind of discrimination in favour of the nationals It was the first task of the framers of the Treaties to lay down a uniform law of nationality for each Succession State* to which the transferred peoples who were not born nationals of another State, would be admitted *ipso facto* and without any formality so that although belonging to the minorities they might not be in any way unfairly and inequitably treated There was an additional ground for this step It will be recalled that after the Treaty of Berlin 1878 the Roumanian Government had passed a Naturalisation Law which laid down

* Articles of the Treaties of Peace with Austria B lgaria Hungary and Turkey which refer to nationality had not been placed under guarantee of the League until 1920

conditions which it was difficult for the Jews to fulfil * Provisions for the protection of the Jewish minority were as a result rendered nugatory for all practical purposes. The law of nationality was stated in the Treaties, and it was further stipulated that minorities would automatically be recognised as nationals as a safeguard against the tyranny of the majority †

Fundamental Rights and their connection with the problem of minorities protection

Secondly, we have seen that provisions for what are called Fundamental Rights form a very important and essential part of the Minorities Treaties. The question may be asked—what has a charter of such rights to do with the question of minorities protection which the Peace Conference was seeking to solve? Are not Fundamental Rights applicable as much to majorities as to minorities? The answer is simple Unless the Rule of Law as it has developed in England is well established it is not unlikely that the majority which control the machinery of the State may seek to curtail the cherished rights of minorities, trample upon those rights and even deliberately deny these to minorities Madison once said that "in all cases where a majority are united by common interest or passion, the rights of the minority are in danger "‡ The world has bitter memories of such abuse of power by the majority who so long as they continue as a majority require in actual administration no extraneous aid of a declaration of essential rights, for they have the final and decisive say in all matters of legislation and administration It is not to be supposed, however, that the majority do not stand to profit at all by provisions for Fundamental Rights But these are not so indispensable to them as they are to minorities "The guaranties of the Constitution," remarked George Sutherland, "are primarily for the protection of the minority The majority can take care of itself "§ It is possible that minorities may be deprived of the rights and privileges guaranteed under the charter by executive decrees or Ordinances, and from this point of view

* *Supra*, p 23

† Hudson and Flournoy Nationality Laws in the Succession States and the Multipartite Treaties, pp 645 650

‡ *Debates*, Aug 13, June 20, June 6, 1787

§ U S A Senate Doc, 328

the guarantees may be considered useless Are they actually useless? They are not The Government of the day cannot and will not dare, except in special circumstances or emergencies, abrogate the guarantees provided in the constitution This is one of the lessons of history Again, these constitute a great and useful instrument of political education They teach the people what are their legitimate rights and to what extent the executive may interfere with their liberty of action without violating the fundamental principles of justice and fairplay In other words, they serve as a warning to overzealous officials and a guide to the people Hence special provisions for the protection of minorities are likely to prove ineffectual unless they are based on or supplemented by guarantees in regard to Fundamental Rights Indeed the latter give the political and juridical background of special rights and privileges When therefore, the Peace Conference sat to lay down the terms of the Minorities Treaties they concentrated their attention as much on Fundamental Rights as on special privileges and they were justified in following that procedure * Fundamental Rights as the name implies seek to ensure individual liberty freedom of conscience liberty of the Press and equality of treatment and they have been conferred on all inhabitants of the countries concerned irrespective of their nationality or citizenship

Thirdly special provisions relate to the use of minority languages in primary schools and the allocation of public money to minorities establishments for educational religious and charitable purposes and guarantees of a similar nature for particular races in certain States for example the Jews in Roumania, the Mahomedans in Yugo Slavia the non Mahomedans in Turkey the Saxons and Czecklars in Tran Sylvania They include also the grant of a large measure of local autonomy to some places for instance Ruthenia under Czecho Slovakia, the Aaland Islands under Finland and the Memel Territory under Lithuania

* Austria Hungary and Roumania have been forced to treat as Fundamental Rights special safeguards in regard to language and allocation of public money

The nature of special rights, the representation of minorities in legislatures, administrations and Services

In the case of the Ruthene territory we have seen that although public appointments are made by the Czecho-Slovak Government, it is stipulated that these must, as far as possible, go to the inhabitants of Ruthenia Again, on the Legislative Assembly of Czecho-Slovakia the territory has been given adequate representation. In Albania the electoral system has been so devised as minorities may be represented on the legislature Hungary has laid down by decree that the Government should, as far as possible, appoint to public offices, both judicial and administrative, persons belonging to minorities. Further, the observations made by Masaryk have been quoted at length to show that the Czecho-Slovak Government have accepted the policy of associating minorities with the administration and public services Some of these safeguards, particularly those in regard to the representation of minorities in the Government and Public Services, have not been provided in international instruments but by local laws or decrees But it cannot be ignored that persons for the time being in authority in some of the Succession States have come to recognise that for proper and adequate development of the nation and in the interests of its solidarity co-operation among all sections of the people is essential and that it is impossible to secure that co-operation unless minorities are permitted to associate themselves directly and actively with the Government, the Services and the legislature. This is a point which it is well to bear in mind in connection with the Indian problem of minorities protection

Obligations of minorities defined

If those are the rights guaranteed to minorities, what are the obligations they owe to the States of which they form part? What are their duties? Rights cannot be conceived except in relation to duties They are interrelated, although superficially and at first sight they contrast sharply Now, the Treaties, Conventions, etc, which we have examined in this chapter, contain no stipulations regarding the duties or obligations on the part of minorities. In 1922, however, resolutions were passed at the Third Ordinary Assembly of the League which laid down principles of conduct for them It is emphasised, for example, that it is incumbent upon

minorities to co-operate with their respective States as loyal fellow citizens It is further stated that the Secretariat of the League should assist the Council in ascertaining in what manner minorities fulfil their obligations to their Governments The information collected on the subject is to be communicated to the States-Members of the League of Nations if they so desire * Those who are engaged in solving the Indian problem ought to take into consideration this aspect of the question when they lay down terms and conditions for the protection of minorities

It is necessary to enquire now how the provisions contained in the Treaties have been enforced and what procedure and machinery have been evolved for the purpose This brings us to the last head, namely, the nature form and extent of League control and supervision which are examined in the next chapter

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Encyclopaedia Britannica, Vol. 15 p. 571

CHAPTER V

THE MACHINERY AND PROCEDURE OF LEAGUE SUPERVISION

In regard to the machinery and procedure adopted by the Conference and the League to deal with the problem of minorities protection in accordance with the provisions made in the Minorities Treaties or embodied in Declarations and Conventions, the Polish Treaty again serves as the model Article 12 of that Treaty provides

> "Poland agrees that the stipulations in the foregoing articles so far as they affect persons belonging to racial, religious or linguistic minorities, constitute obligations of international concern and shall be placed under the guarantee of the League of Nations They shall not be modified without the assent of the majority of the Council of the League of Nations The United States,* the British Empire, France, Italy and Japan hereby agree not to withhold their assent from any modification in these articles which is in due form assented to by a majority of the Council of the League of Nations
>
> "Poland agrees that any member of the Council of the League of Nations shall have the right to bring to the attention of the Council any infraction, or any danger of infraction, of any of these obligations and that the Council may thereupon take such action and give such direction as it may deem proper and effective in the circumstances
>
> "Poland further agrees that any difference of opinion as to questions of law or fact arising out of these articles between the Polish Government and any one of the principal Allied and Associated Powers or any other Power, a member of the Council of the League of Nations, shall be held to be a dispute of an international character under Article 14 of the Covenant of the League of Nations The Polish Government hereby consents that any such dispute shall, if the other party thereto demands, be referred to the Permanent Court of International Justice The decision of the Permanent Court shall be final and shall have the same force and effect as an Award under Article 13 of the Covenant"

* Having already withdrawn from the League the United States was no signatory to the Lausanne Treaty.

The League recognises only racial religious or linguistic minorities.

A glance at the first paragraph of the clause will make it clear that the minorities to which the provisions for protection apply and of which the League takes cognisance are *racial, religious or linguistic minorities* In the Treaties, therefore, no account is taken of a political or an economic minority It is also contended by a certain section of expert opinion that the obligations of the League in the matter of the observance of the Treaty clauses are restricted to those provisions only which affect the specific rights of minorities as distinguished from the Fundamental Rights of the people It is suggested by Temperley and in *Ten Years of World Co-operation* and also in the British Year Book of International Law that the League is denied any right to impose upon an existing State any principle of government however admirable - or to intervene in the general administration of that State The League is called in, observes Temperley, not as an authority with the general responsibility for imposing the principles of free and constitutional government or guaranteeing liberties of any kind, but solely and entirely as the guarantor of certain clauses in Treaties which have been made between certain sovereign States * The authors of *Ten Years of World Co-operation* recognise the fact that the Minorities Treaties establish some very important rights such as the protection of life and property but they point out at the same time that those Fundamental Rights are not under any international guarantees †

The clause seems to bear that interpretation at first sight But no interpretation is complete and scientific unless reference is made to the context and to the various provisions made in the Treaties It will be seen that eight articles out of twelve of the Polish Treaty contain stipulations regarding what are called Fundamental Laws, and it is difficult to understand why those stipulations should be made along with particular provisions for minorities in one international instrument giving the League power to interfere in the case of infraction of the latter provisions

* Temperley: A History of the Peace Conference, Vol. V, p. 140.

† Ten Years of World Co-operation, pp. 361-62.

and depriving it of any voice in regard to the Fundamental Laws. If the intention was to restrict the supervision of the League to special provisions, in so far as they affect minorities, the Allied and Associated Powers ought to have been satisfied with those provisions only without seeking to lay down in an international document general principles of government stating the rights of people of admittedly sovereign States. Again, if the meaning sought to be put upon the Treaties by Temperley and the authors of *Ten Years of World Co-operation* be correct, there is absolutely no reason why no arrangement could be made for adequate and similar protection of the minorities in old, large and powerful States, *i e*, for the protection of the Negroes of America, the Basques of Spain, the Welsh and the Scots in Great Britain and the new German subjects of Italy. Temperley's argument is that any such provisions would have created an innovation in the public law of Europe and as such would have provoked *the strongest and bitterest opposition* at the Conference of Paris from the big Powers concerned It may be said in reply that there should have been no cause for fear even if they involved an innovation inasmuch as the intention of the League Treaties, according to Temperley, was not to lay down principles of government as contemplated in guarantees of the Fundamental Rights. What perhaps is meant is that although the Treaties establish certain very important rights such as the right to the protection of life and liberty and equality of treatment—and these not only for the benefit of minorities but for that of all the inhabitants—any infringement of the provisions establishing those rights, to the prejudice of a person or persons belonging to a national majority, would "not bring the League's guarantee into play"[2] as the guarantee in this regard applies to minorities In other words, the League has no right to intervene in the interests of a majority community Nor, it should be added, has it any right to come to the aid of minorities belonging to countries not bound by Minorities Treaties or of non-national inhabitants of a Treaty State even if they constitute a minority. Temperley does not therefore seem to be correct when he says that the League

The explanation that "Fundamental Rights" stated in the Treaties are not under international guarantee is not convincing

is solely and entirely the guarantor of certain clauses in the Treaties * It is, on the contrary, the guarantor of all the clauses incorporated in the Treaties in so far as they affect the minorities as opposed to the majority community in countries which have accepted the Treaties or made declarations or signed conventions as the case may be

An important Lithuanian case rejects the orthodox view

In this connection an important case relating to the Ukranians in Lithuania deserves a close and careful study for the elucidation of the points involved * In November 1927, the Secretary General of the League Council received a petition of complaint against the Government of Lithuania by 21 persons of Ukranian origin resident in Lithuania The petitioners had been living in that State, where they had purchased land since 1910-1912 When Lithuania became an autonomous State these Ukranians agreed to become her citizens at the request of the local Police Soon after the Lithuanian Government declared that those Ukranians were aliens and that in that view of the case they were going to take possession of their lands This was done, although repeated protests were made by the persons affected The petitioners affirmed that no such penalty was imposed on Lithuanians who had purchased land under similar conditions and that this drastic action was taken against them simply because they were Ukranians

In December, 1927 the Secretary General according to whom the petition satisfied the conditions of receivability laid down in the Council resolution of the 5th September 1923 referred it to the Lithuanian Government for its observations The latter on receiving the petition questioned its admissibility under paragraph II of section I of the resolution in question The question of acceptance was in due course submitted by the Secretary General to M Urrutia the then Acting President of the Council * The Acting President gave his considered opinion that the petition was receivable Again the Lithuanian Government was not convinced by the Acting President s decision and requested that the question of admissibility should be considered by the

* See Document C. 265 1928, I.

Council. The matter was brought up before that body and the discussion thereon took place at its 50th Session on the 6th of June, 1928. The Lithuanian Government put forward four arguments in support of its objection to the acceptance of the petition The first ground was that the petition purported to have been signed by members belonging to a Ukrainian minority in Lithuania whereas such a minority did not in fact exist A minority, it contended, must have the two following characteristics (I) it must belong to the country permanently, *i e*, by origin and (II) it must be sufficiently numerous to constitute an appreciable percentage of the country's population M Urrutia in reply stated that the Lithuanian declaration of May, 1922, spoke of citizens generally and made no mention of any particular nationality of origin for the purposes of protection The declaration, therefore, applied to them whatever their origin provided they were of Lithuanian nationality. Secondly, the declaration laid down no rule regarding the number of persons entitled to protection The protection was expressly granted to any Lithuanian national and differences of religion, creed and confession were not to prejudice any Lithuanian national Thirdly, when any emphasis was laid on the number of the beneficiaries, it was formally and clearly stated in the articles such as in those dealing with the allotment of public funds for educational purposes

The next principal argument raised by the Lithuanian Government was to the following effect "The plaintiffs are not appealing to the Civil Courts, but to an institution—the League of Nations—which is of great political and international importance They ask it to defend their civil rights They do not say that they are subjected to persecution on account of their religion but that their land has been taken away from them . The Government is in a position to realize from the petition that the matter concerns civil and not public law It is for this reason that the Lithuanian Government considers that the petition should be declared irreceivable "* It was stated in reply that an examination of any of the Minorities Treaties or Declarations under the

* A similar argument was raised by the Roumanian Government during the examination of the case of the descendants of the former Czeckler Frontier Guard Regiment at the 66th session of the Council meeting held on the 29th January, 1932

League of Nations would clearly show that they were intended to give protection to minorities both in respect of their civil and political rights

The other two grounds raised by the Lithuanian delegate in support of his objection to the acceptance of the petition are not relevant to the issues which we are considering here and are, therefore left out It ought to be noted however that all the objections put forward by Lithuania failed to survive the scrutiny of the Council and that M Urrutia s decision was upheld

Three things emerge clear from the decision finally taken by the Council in September 1928 The first point is that protection guaranteed under the League is extended to a minority of any size in regard to rights in respect of which no specific provision has been made as is contemplated in articles which deal with the allotment of public funds Secondly protection is guaranteed to all minorities whatever might be their origin provided they are nationals of the State concerned Thirdly the Treaties Declarations and Conventions deal with civil as well as political rights of the minorities entitled to protection under the League of Nations

The method of seizing the Council.

The second paragraph of the clause gives any member of the Council the right to bring to its notice any infraction or any danger of infraction of the minorities provisions We have already referred to the fact that Greece claimed the right of drawing attention of the League to the infringement of minorities provisions in Albania and that the claim was ultimately rejected The question of supervision was raised again in 1925 when the Hungarian representative at the Sixth Session of the Assembly of the League wanted it to be laid down that the supreme ecclesiastical organisations or the cultural or economic institutions of different countries should have power to notify the Council directly about infringements by means of petitions The proposal was opposed by the Brazilian representative and failed to obtain the assent of the Assembly The present position is that even States which are members of the League but not of its Council have no right of direct access to the Council in this matter This seems to be a defect of the Treaties for it

is just likely that members of the Council not directly affected may not take interest in the grievances of certain minorities and thus frustrate the object underlying the Treaties On the Council being notified in proper manner of any infringement of the minorities clauses it proceeds to take such action as it deems necessary and effective in the circumstances It is clear that this part of the paragraph confers general and wide powers upon the Council without any clear statement, or even indication, of the actual procedure to be followed But the Council as a rule acts in accordance with the procedure defined in Article 4 of the Covenant which imposes on that body the obligation of inviting a representative of any member of the League not being represented on its Council, to discussions particularly affecting its interests In actual practice the procedure followed is one of friendly negotiations between the Council and the Government concerned

Principles evolved under the auspices of the Council

Five basic principles seem to have been evolved under the Treaties for the purpose of enforcing the provisions Of these, three were, as Julius Stone points out, present in the settlement as agreed upon at the Conference in Paris while the other two have been produced empirically as a result of years of the Council's experience * The first principle emphasises that the guarantee of the rights of minorities is a collective guarantee Formerly, individual States forming constituent parts of the concert of Europe had the right of direct political interference in the internal arrangements of an autonomous State bound by international obligations of minorities protection That was a dangerous policy from the point of view of European peace, for interference was directed, as events showed, not towards safeguarding the rights of minorities but generally towards satisfying political ambitions It is true that certain provisions for minorities protection in the nineteenth century Treaties were embodied in collective instruments like the Paris and Berlin Agreements, but there was no stipulation for joint action by the Powers in the case of infraction of any of the provisions The Powers could, if they

* Julius Stone International Guarantees of Minority Rights, p 247

desired, have recourse to concerted action in the interests of European peace but as each of them looked at the problem from the standpoint of its material and political interests the result actually was that individual interference inspired by political motives rather than collective intervention in the interests of peace and security was the rule Statesmen assembled at the Peace Conference of 1919, were confronted with this difficulty and they made it a point to eliminate as far as possible, the dangers involved in the old type of intervention But the danger of abuse of authority vested in the Powers by politically motived action was not completely removed despite the best efforts on the part of the Conference There is no doubt that under the text of the Treaties action by the League for the protection of minorities cannot take the form of direct intervention But the possibility of a State-Member of the League bringing before the Council any question relating to minorities under paragraph II was not altogether ruled out In such a case political motives might operate thereby rendering the safeguards against direct political intervention infructuous for all practical purposes The consequences involved in such action were obvious In the first place it was possible for an aggressive State to exploit the procedure for illegitimate purposes * In the second place there was the danger that members of the Council would refrain from seising the Council on account of the fear that political motives would be imputed to them † The Council saw these dangers and sought to deal with them without violating the spirit of the Treaties

* In discussing the great fault of the nineteenth century system the Adacti Report states: The result was that any action taken by the States in question for the benefit of the minorities was likely in fact to be based or at least was certain to be generally believed to be based not simply on the desire to see that the rights of the minorities were properly safeguarded but on considerations arising from their individual political interests

† Speaking before the Council on the 6th of March 1929 Sir Austen Chamberlain observed The Treaties contemplate that it shall be the friendly right of any State-member of the Council to draw the attention of the Council to what it might consider to be an infraction of any of the Minorities Treaties That was an invidious and thankless task to impose upon the members of the Council so invidious that individual State-members of the Council might be unwilling to discharge it and that if we relied on such individual initiative and on that alone we might fail to watch over the Treaties as it was intended we should do By this means (i e the Minorities Committees) the dangers the difficulties and the invidiousness of the individual intervention of a particular State would be avoided. (O.J April 1929)

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The Council decided that every petition concerning the protection of minorities should be examined by three of its members This examination is undertaken with a view to eliminating political intervention and determining whether one or more members of the Council should draw its attention to an infraction or danger of an infraction of the provisions incorporated in the Treaties It may now be taken for granted that the resolution passed in October, 1920, has, as far as possible, removed the dangers of politically motived action by members of the Council and made the seising of the Council almost an automatic process But care has been taken at the same time to see that this procedure does not run counter to the spirit underlying the Minority clauses as would be clear from a study of the proceedings of the Council meeting of the 2nd of October, 1920 The parties concerned in discussions relating to Treaty infractions are the Council of the League on the one hand and the State concerned on the other Any other party has no *locus standi* in law in the procedure

The second principle is that no international personality has been conferred upon persons belonging to minorities. They do not enjoy any juridical status either before the Council or the Permanent Court of International Justice They must not be considered *vis-a-vis* the State to which they nationally belong as litigants in a suit Their function at best is to inform, and it does not produce any effect in law

It must be remembered that the procedure adopted by the League has introduced permanent control and supervision It is the duty of the Council, according to the Tittoni Report, to ascertain "that the provisions for the protection of minorities are always observed" The new machinery of control has opened a new chapter in the history of minorities protection. The seeds of this permanent control were present in the nineteenth century procedure but it is only during the post-War period that they have developed into plants and are producing fruits. The vesting of powers in the Council for the protection of minorities under the Guarantee Treaties implies, if it implies anything, that the Paris Conference intended that the rights of control, formally vested in the Powers individually, must henceforward be exercised by the Council of the League as a collective

body The matter has been explained at considerable length in M Clemenceau s letter addressed to the President of the Polish Republic *

The third principle evolved is the introduction of the judicial element This is entirely a novel feature In the earlier Treaties the interpretation of the provisions was left to the Signatories themselves No provision was made for an unbiassed consideration of the complex issues which might have arisen in connection with the violation of the protection clauses The result was that the States bound by Treaty obligations were enabled to interpret them to the prejudice of minorities and that each signatory Power had the right to intervene on the ground of alleged infraction of the clauses as interpreted by those States The dangers involved were clear It is now accepted as a general principle that States shall not be judges in their own suits That principle was emphasised in the report of the Committee on New States on the memorandum submitted by the President of the Polish Republic † The report observes The establishment of the League of Nations of which Poland is a part, moreover, removes as a consequence all interference of a foreign Power in her internal affairs, for it assures to her the guarantee of an impartial examination by the Court of Justice of the League of Nations, *i e* by an Assembly which is judicial and not political

The three principles discussed above are implicit in the terms of the Treaties themselves Two other principles, as we have already pointed out have been evolved as a result of experience First the Council came to be convinced that the most effective method of achieving its end was to persuade the parties concerned to a policy of co-operation and not to impose its will on them It has therefore been the constant endeavour of the Council to seek co-operation even where law does not rule out dictation But as Julius Stone says,‡ it has its dangerous aspect also, for collusion may take the place of co-operation For its success such a policy depends in a large measure on trust and

* Supplement No 73 p. 44
† Miller : My Diary at the Peace Conference, Vol. XIII pp. 100-1.
‡ Julius Stone International Guarantees of Minority Rights p 218.

confidence and a spirit of accommodation and the sincerity of the parties. Secondly, the sanction of public opinion is considered essential to a smooth and satisfactory working of the League's guarantees in regard to the protection of minorities. The Council has taken upon itself the task of exchanging views with the parties in the friendliest possible manner and issuing a large mass of literature bearing on the issues dealt with for the purpose of educating and enlightening public opinion. It is an effort worthy of being persevered with in the interests of peace and of the protection for minorities. But it cannot be said that it has met with absolute success. Such a policy has an obvious limitation in the fact that after all and in ultimate analysis the most effective sanction for nations as well as individuals is physical pressure.

How the Treaty clauses may be modified, difference in method between substantive clauses and procedural clauses.

The subject-matter relating to the alteration or modification of the provisions made in Article 12 and in the preceding articles falls under two heads. The first deals with modifications of the provisions as to substantive rights and the second with modifications in the procedural provisions. So far as the former is concerned, para. I of Art. 12 lays down clearly the specific manner in which modifications may be effected. A careful study of the provisions already quoted would show that three general rules may be deduced from them. In the first place, it is not possible to bring about any change in the provisions as to substantive rights without the consent of the majority of the League Council. Secondly, if the majority of the Council agree to a particular change proposed, the principal Allied and Associated Powers who are signatories to the Treaties, are not entitled to withhold their approval. The article leaves hardly any room for doubt as to the legal validity of these principles. Thirdly, some jurists are of opinion that the incidence of the clause includes, by intendment, though not expressly, the sanction of the State concerned to any changes in the provisions. This is supposed to follow from the absence of any provisions to the contrary in the Treaties. The idea is that had the authors of the Treaties intended to exclude the State from having any voice in the alteration or modification of

the clauses, their intention would have been expressed clearly in Art 12 The Jurists Report of the 6th of March, 1929, throws some light on the matter According to that Report, the State or States concerned will not be invited to participate in discussions round the Council table as being specially interested in the subject for discussion Only when the Council s decision has been finally taken it will be forwarded to the State or States for its or their necessary assent *

Now, as regards the procedural part, no specific provision has been made Hence it is necessary to deduce the essential conditions for a valid modification from the general principles of international law Accepting the general thesis that in the absence of any definite direction in the law each of the three parties is entitled to resist any modification or alteration it follows that whereas the consent of the majority of the Council is sufficient to justify any change in the substantive rights of minorities a unanimous decision is required for the purpose of altering Article 12 itself In other words, the Council must vote unanimously and the States concerned must give their assent in favour of any change in regard to procedure if it is to be effective In the Adact 1 Report† we find Without the express consent of the parties to the Treaty the League can neither relieve the members of the Council of their responsibility nor extend it to any other body The parties referred to here are (1) the Council (2) the signatory Powers and (3) the State or States affected by any change in the Article For all practical purposes at any rate now or for some years to come there is no difference between the Signatory Powers and the members of the Council, for all the Signatory Powers are represented on the Council If the Council therefore, accepts any modification, the assent of the signatory Powers may be taken for granted

The Jurists Report, however has rejected the view expressed in the Adactor Report and holds that there should be two parties and not three to an agreement *viz*, the Council and the State or States bound by minorities obligations ‡

O.J April 1929

† Supplement No. 73 p 47

‡ O.J April 1929

But as we have explained above, it is a distinction without a difference Adacteı emphasises the theoretical aspect of the issue involved while the Jurists lay stress on its practical bearing

Minorities cannot effectively renounce their rights and give relief to Treaty States

The question as to whether minorities themselves have any *locus standi* in the matter of the procedure as regards modification, abrogation or enforcement of the provisions embodied in the Treaties, Declarations or Conventions, has often been raised Does a statement or a declaration, for example, made by minorities in any State, bound by international obligations, to the effect that the provisions in Municipal Law are sufficient for their protection and that they require no international supervision or control, absolve the State concerned from the responsibilities which it has undertaken under a Minorities Guarantee Treaty? The answer must be in the negative both from the point of view of law and from the point of view of practical common sense and expediency The legal nexus created is between the Signatory Powers, the State bound by Treaty obligations and the League of Nations, and in the case of Declarations to which reference has already been made, between the State concerned and the League Minorities do not come in at all in this respect, and it is therefore clear that their renunciation of rights incorporated in a protective instrument has no legal effect upon the State's international obligations Those obligations remain

An important case illustrating the point has been reported from Turkey * Under Article 42 of the Treaty of Lausanne Turkey undertook, in respect of her non-Moslem citizens, to adopt "in so far as concerns their family law and personal status, measures permitting the settlement of these questions in accordance with the customs of those minorities" It is stated that petitions by representative Committees of various minorities, *viz*, Armenians, Greeks, Orthodox, Jewish, Protestant and Catholic, were addressed to the Turkish Minister of Justice expressing the view that they were "convinced of the uselessness of the provisions

* M W Royse International Protection of Minorities, New York, 1932

laid down in the Lausanne Treaty for the minorities the futility of which is obvious " They were apparently encouraged to take that view by the modernisation of the Turkish legal system under the new Republic which is held to conform to fair standards of equity and natural justice The League does not seem to have taken any serious notice of the situation created in Turkey There is no doubt that in law such petitions cannot justify Turkey s release from minorities obligations If, however, such a mode of relief is sanctioned by the League the results are likely to be disastrous Minorities physically weak and economically backward may be coerced or intimidated into addressing the League asking for withdrawal of international obligations on the part of the State or States concerned The League must guard against these dangers in the interests as much of the minorities as of the peace of the world

The third and last part of the clause places questions of fact and of law arising out of differences between the Allied and Associated Powers or any member of the Council on the one hand and a signatory State on the other regarding the provisions of the Treaties within the purview of the Permanent Court of International Justice The signatory State with the consent of the other party must refer the disputed points to the Court for arbitration The decision of the Court shall be final and conclusive and it shall have the same force and effect as an award under Article 13 of the Covenant * In this matter the disputes which

* The members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration or judicial settlement they will submit the whole subject-matter to arbitration or judicial settlement.

Disputes as to the interpretation of a Treaty as to any question of international law as to the existence of any fact which if established would constitute a breach of any international obligation or as to the extent and nature of the reparation to be made for any such breach are declared to be among those which are generally suitable for submission to arbitration or judicial settlement

For the consideration of any such dispute the court to which the case is referred shall be the Permanent Court of International Justice established in accordance with Article XIV or any tribunal agreed to by the parties to the dispute or stipulated in any convention existing between them

The members of the League agree that they will carry out in full good faith any award or decision that may be tendered and that they will not resort to war against any member of the League that complies therewith. In the event of any failure to carry out such an award or decision the Council shall propose what steps should be taken to give effect thereto."

are of an international character under Article 14* are, in the words of M Clemenceau, "removed from the political sphere and placed in the hands of a judicial body."

Difference between inter-State disputes and minorities questions, the danger involved in the confusion of issue

It is necessary to point out the difference between the advisory opinion of the Permanent Court and the opinion of that Court which is binding upon the parties There is a sharp division between minorities questions proper and disputes arising between individual States as to questions of law or of fact relating to the relevant provisions in the Treaties In the case of the minorities questions proper, the Council's freedom is extensive after it has been seised of the business, and extends reference to the Permanent Court of International Justice for an advisory opinion upon the legal issues involved In the case of disputes between a State and a State-Member of the Council the latter is entitled unilaterally to refer the question or questions to the Permanent Court whose decision must be accepted as final by both the contending parties It is difficult to observe this clear separation of disputes between States from the minorities questions proper, but on one or two occasions the line of demarcation has been sought to be preserved Reference may be made in this connection to the long dispute between Poland and Germany regarding the eviction of German settlers by the Polish Government from former Prussian Poland One of the points raised in the dispute had a bearing on the meaning and incidence of Polish nationality, a subject for which provisions have been made in Articles 3 and 4 of the Polish Treaty The dispute might have been considered either from the point of view of minorities protection or from the point of view of a conflict between two States As a matter of fact, at the Council meeting of the 4th of July, 1923, M De-Rio-Bianco, Rapporteur for minorities questions, made both the alternative suggestions †

* "The Council shall formulate and submit to the members of the League for adoption plans for the establishment of a Permanent Court of International Justice The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly"

† O J, July, 1923

The Polish representative contended that it was not a minorities question proper and opposed the reference of the matter to the Court The Council, however, held the view that it was not an inter-State dispute and, in exercise of its competence under paragraph II of Article 12, it referred the question of law to the Court According to Julius Stone, once the Council has been seised of a minorities question under the Treaty provisions it should proceed to its examination as such, regardless of the fact that a dispute exists between certain States on the very points involved On the other hand, if a minorities question is brought to the notice of the Council under Article 11 or 15 of the Covenant relating to disputes, the Council should proceed to deal with it *as a dispute* and ignore the fact that it happens to concern the protection of minorities * The first point was illustrated in the German Polish case already referred to and an example of the second proposition is afforded by an important case which arose between Greece and Turkey in 1924 regarding the expulsion of Greeks from Constantinople † In the second case the Council decided that it was an inter State dispute and not a dispute relating to the protection of minorities and the ground adduced was that the question was raised not by a member of the Council but by the delegates of the Greek and Turkish Governments ‡

We think that the procedure evolved is likely to lead to a considerable amount of confusion and is bound to complicate the situation It seems to be desirable if the guarantees provided for in the Minorities Treaties are to be effective that any question relating to the protection of minorities brought before the Council, should be treated as such and not as an inter State dispute under Art 11 of the Covenant The Council should try to keep the parties under effective control so that the provisions for the protection of minorities may not be rendered null and void by resort to the procedure under that article Herein lies ample room for further development in the Council procedure

* Julius Stone: International Guarantees of Minority Rights pp 132-33.
† O.J November 1924
‡ O.J February 1926

This view is supported in the report of the Committee composed as it was of M Zaleski, Sir Austen Chamberlain and M. Adâctci, which was published in 1928 * The Committee observe

> " One of the main objects of the system of the protection of minorities would be frustrated, and an important purpose of the Minorities Treaties themselves would be defeated if the Council consented to accept as normal an appeal based on Article 11 in lieu of the minority procedure
>
> " Article 11 should only be invoked in grave cases which produce the feeling that facts exist which might effectively menace the maintenance of the peace between nations In normal cases, on the other hand, an appeal to Article 11 would create the very dangers which the Minorities Treaties were intended to avert "

That pronouncement was made by the Committee on the case of the Albanian minority in Greece raised by the Albanian Government Albania appealed to the Council under Article 11 of the Covenant and not according to the usual minorities procedure The Council accepted the opinion given by the Committee of Three In our considered judgment, the decision was what it ought to be.

The controversy regarding the League's powers of supervision

In exercise of the powers conferred upon it the League has laid down the procedure for the purpose of enforcing the provisions of the Minorities Treaties The article or the articles in the Treaties concerning the League's powers of intervention provoked a good deal of controversy, and different interpretations were sought to be put on them by different authorities The report on the subject drafted by M Tittoni and accepted by the Council in 1920, embodies the official interpretation of the clauses In the course of his report M Tittoni remarked

> " The provisions for the protection of minorities are inviolable—that is to say, they cannot be modified in the sense of violating in any way rights actually recognised and without the approval of the majority of the Council of the League of Nations

* O J , July, 1928

Secondly this stipulation means that the League must ascertain that the provisions for the protection of minorities are always observed

The Council must undertake action in the event of any infraction or danger of infraction of any of the obligations with regard to the minorities in question

The right of calling attention to any infraction or danger of infraction is reserved to the members of the Council

The German Government demand a permanent Minorities Committee; objections against such procedure.

According to that text, certain forms of procedure grew up regarding the nature and extent of the League s supervision, the petition of complaint on behalf of the minorities, the disposal thereof by the League and its Secretariat and so forth These forms of procedure did not satisfy the German Government, although they had been applied for years And in the March and June Sessions of the Council in 1929 Dr Stresemann pointed out that the clauses gave the League powers of intervention not only in specific cases of infraction but also powers of permanent supervision over the position of minorities in various countries which were bound by the Treaties He quoted precedents to show that the League would introduce no innovation if it went beyond the specific cases submitted to it for disposal Accordingly he proposed the creation of a permanent Minorities Commission to take up on behalf of the League the work of general supervision It was suggested that such a Commission should have for its function the task of collecting material on the subject out of sources of information placed at its disposal, particularly from the countries or communities concerned and of submitting it with its own observations to the competent constitutional authorities Such a procedure Dr Stresemann urged would in no way abrogate the Treaties, Declarations made or Conventions signed In order to avoid misunderstanding he made it clear that it was not his intention to create a body for the purpose of impairing the authority of any particular State and of restricting its internal sovereignty Almost the same view had been expressed by Professor Gilbert Murray in 1921, and a proposal embodying that

view had been sponsored, but it was ultimately withdrawn.* The reason assigned by the German Government in support of this procedure was stated thus:

> "The method of simply entrusting this duty to the Secretariat would appear to be satisfactory. This observation does not of course, in any way, imply a criticism of the manner in which the Minorities Section has discharged its duties. The reason for this inadequacy must rather be sought in the fact that in accordance with its constitutional status the section is a purely executive body and cannot, on its own authority, take any initiative or decision. The constant supervision of the minorities situation is a task, which, by its very nature, requires a special organ which should within certain limits be capable of taking independent action."

The translation of this view into practice presupposes an obligation on the part of the States bound by minorities guarantees to supply information whenever asked for. It implies further that the proposed Commission will have power to make personal investigation into the questions that arise on which to base its reports to the Assembly and the Council. Without these the Commission is bound to be in the same position as the Minorities Section. It would lead to a mere duplication of machinery and in no way increase the efficiency of the delicate and complicated work undertaken by the Council. It is clear that the States bound by minorities undertakings, with the exception of Austria and Hungary, are stubbornly opposed to the setting up of a Permanent Commission, and there is no sign that they will revise their attitude and willingly undertake any obligation to supply the Commission with detailed information or to allow personal investigation by it. In this view of the case, the Adacter Committee appointed to examine the proposal put forward by the German Government expressed their dissent from the opinion held by the latter.† The Committee concluded that "the Treaties contain no provisions permitting the Council to exercise constant supervision

* Miss Mair: The Protection of Minorities, p. 63.
† Supplement No. 73, p. 62.

with regard to the situation of the minorities, *i e*, a supervision capable of being exercised apart from cases in which a member of the Council has drawn the latter's attention to an infraction or danger of infraction of the Treaties They added that any supervision outside the examination of cases of infraction or danger of infraction would be outside the scope of the *Council* [4]

The decision taken by the Adactci Committee seems to be justified in the present circumstances In the first place the German proposal, if given effect to, would give rise to suspicion and mistrust which it is *the duty of the Council of the League to* eliminate In the second place, the object aimed at may be attained by strengthening the personnel of the Minorities Section in accordance with paragraph I of the Assembly resolution of September 21, 1922 and by giving the section power in addition to its normal functions, to prepare and submit to the Council and the Assembly periodical reports on the general position of minorities without reference to any particular case But here again the co-operation of the State concerned is essential and where that co-operation is available the Minorities Section may be asked to make personal investigation In any case the time does not seem to be yet ripe for imposing on an unwilling State a permanent Commission of investigation Any such action would produce deadlocks

The procedure adopted in 1920 stands.

The controversy regarding the procedure of supervision and the machinery of control seems to be closed for the time being and the procedure adopted in 1920, stands subject to certain subsequent changes in form The League has taken steps to form two bodies—one is called the Minorities Committee and the other the Minorities Section which is a special department of the League's Secretariat All communications between the Minorities Committee or Committees and the *Government concerned pass through the Minorities* Section It is the business of the Section to collect information on relevant facts and data from the petitions of complaint and from the observations of Governments and also from other sources and to prepare special memoranda for the Committees

There are various methods by means of which the Section procures information regarding the questions of minorities protection First, petitions sent to the League bearing on minorities grievances serve as a source of information The second method is the maintenance of a special Press Information Bureau About twenty newspapers, representative of the interests of both the minorities and Governments, are regularly received by the League from the States concerned Summaries of the articles contained in these papers dealing with the grievances of minorities are made and preserved and circulated among all members of the Section Thirdly, information is obtained and verified by personal visits of the members of the section to the countries which request the section to undertake journeys for the purpose These are not in the nature of official enquiries, nor are they made in pursuance of any resolution of the Council They are friendly visits * It must be remembered at the same time that the patronage of the Government under which such visits are undertaken tends to detract from their value as instruments of investigation for the purposes of minorities protection Members of the section are liable in such circumstances to ignore the standpoint of the minorities affected Lastly, the door of the section is always open to those who express any wish to communicate information or an opinion on the situation of group minorities or on the general question of minorities

A Minorities Committee is formed for each petition of complaint submitted to the League The Committee generally consists of the President of the League Council and two other members who are the President's own nominees His choice of colleagues is subject to two conditions † In the first place, they cannot be representatives of the State or States to which the minorities in question belong In the second place, no representatives of a neighbouring State or of a State the majority of whose population is of the same racial stock or of the same religious persuasion, can sit in the Committee Even the Presi-

* An example of this kind of enquiry by the section is afforded by the case concerning the monasteries in Greece (See O J , Feb , 1932)

† See the Resolution of 10th June, 1925.

dent has to retire in favour of an impartial and third party if he himself falls within these categories Although it is a Committee of Three, the President has power in exceptional cases to invite four instead of two members of the Council to co-operate with him in the examination and disposal of petitions

The Committee, as soon as it is constituted, receives a memorandum from the League Secretariat The points raised in the petitions and observations thereon by the Governments concerned are embodied in the memorandum The Committee has power to dismiss a petition on the ground that it is not substantiated by facts When the Committee holds the view that the complaints received are not serious enough to call for the Council s intervention it decides that some sort of negotiations is necessary for the purpose of removing any cause of misunderstanding or suspicion In such a case it places itself in communication with the State to which the complainant party nationally belongs The Committee may refer the matter to the Council for necessary action If, however it decides not to place the petition in the agenda for the Council it has to inform the members of that body of its decision in the matter Whether the question is referred to the Council or not any member thereof is entitled to raise it at its meetings In order that the subject may receive adequate publicity the Secretary General has to publish annually in the *Official Journal* of the League statistics regarding the number of petitions declared unacceptable, the number of petitions brought to the notice of the Minorities Committee the number of Minorities Committees constituted for the purpose and the number of meetings held by them

Duties and functions of the Minorities Committees

The petitions are addressed to the League of Nations and may emanate from any persons or a group of persons whether belonging to the minority or not or from any Government In July 1923, the Government of Czecho-Slovakia pointed out that if all petitions were entertained by the League there would be no relief against factious attempts by designing parties to give the League unnecessary trouble The point was urged with considerable

The conditions that petitions of complaint are required to satisfy

emphasis The Council thereupon laid down five conditions which a petition must satisfy before it could establish its title to consideration It may be remembered that since 1921,* most of these conditions had been insisted upon as the determining standards. In 1923, they were adopted formally by the Council. The conditions are:

I That a petition must have in view the protection of minorities in accordance with the provisions of the Treaties,

II That it must not emanate from an anonymous or unauthenticated source,

III That it must not be submitted in the form of a request for the severance of political relations between the minority in question and the State to which it nationally belongs,

IV That it must not be couched in violent or intemperate language, and

V That it must contain information or refer to facts which have not recently been the subject of another petition

The Adacter Report,† classifies these conditions as follows:

I *As to origin.* The petition must not emanate from any anonymous or unauthenticated source

II *As to form* The petition must abstain from violent language

III *As to content* (*a*) The petition must have in view the protection of minorities in accordance with the Treaties

(*b*) In particular it must not be submitted in the form of a request for the severance of political relations between the minority in question and the State of which it forms a part

(*c*) It must contain information or refer to facts which have not recently been the subject of a petition submitted to the ordinary procedure

It must be noted that the work of the Secretariat is only to examine the form of the petition, and not the questions of substance which the allegations contained in the petition raise The observations made on the subject in the Adacter report deserve notice The report states that "the Secretary-General has merely to carry out a cursory examination of the facts and information submitted by the petitioner He cannot verify any of the

* See C 517, M 366, 1921

† Supplement No. 73, p 57.

facts or even undertake to examine the substance of the questions raised in the petition In principle where the statement of facts in a petition is *prima facie* in accordance with the three conditions required it is declared acceptable There is however, provision for exceptional cases If a petition is addressed by a member of the League, or if, in the opinion of the Secretary General, it is exceptional and extremely urgent, it will be immediately communicated to the Members of the Council and submitted for consideration to a Minorities Committee *

How petitions are dealt with.

If and when declared admissible, the petitions are generally forwarded in the first instance to the Government complained against for its opinion and then sent with that Government s observations to members of the Council for their information Any State-member of the League is entitled to receive copies of petitions addressed to the Council In 1929, it was decided that when a petition would be certified as unreceivable the Secretary General should inform the petitioners accordingly and acquaint them with the essential conditions of receivability It is to be noted that liberal and generous interpretation has been put upon the condition which insists upon avoidance of abusive or violent language Allowance is made for persons who have not yet learnt to value decorum in speech and writing and hardly is a petition rejected on the ground that the form does not correspond strictly to the rules

The law of procedure in Upper Silesia is slightly different † It provides for two methods—one might be called the local method and the other method is one according to which petitions are directly addressed by minorities to the Council of the League The local method is defined clearly in the German Polish Convention ‡ Each of the two Governments namely the German Government and the Polish Government is required to establish a Minorities Office in its part of the plebiscite territory in order that petitions from members of a minority may receive uniform and equitable treatment from the administrative authorities § The

* *Cf* the procedure adopted in regard to Upper Silesian Election Petitions of 1930

† Articles 147 158.

‡ Arts. 148-156

§ Art. 148

Minorities Office forwards these petitions to the President of the Mixed Commission for his opinion, the President himself being appointed by the Council of the League The Minorities Office has power to reject any petition if, in its opinion, the petition fails to satisfy those conditions * Reference to the President has, however, to be made in cases where the action of the Minorities Office has failed to give satisfaction to the petitioners † The President is entitled to make enquiries into matters raised in the petition He gives the Members of the Mixed Commission an opportunity of expressing their views Nor are the Minorities Office and the petitioners themselves debarred from exercising that right, namely, the right of presenting their views The President then communicates his own opinion to the Minorities Office ‡ That office forwards it in its turn to the conpetent administrative authorities and informs the President of the Mixed Commission of the view taken by those authorities on the opinion expressed by him § The proceedings are strictly confidential The President may however order or allow publication of the proceedings if he thinks that such publication is essential to the discharge of his responsibilities || If the petitioners are satisfied with the action taken in the matter by the administrative authorities who represent the Government, they may appeal to the Council of the League of Nations ¶

The direct method of appeal to the Council is provided for in Article 147 of the Convention which states .

> " The Council of the League of Nations is competent to pronounce on all individual or collective petitions relating to the provisions and directly addressed to it by members of a minority When the Council forwards these petitions to the Government of the State in whose territory the petitioners are domiciled, this Government shall return them, with or without observations, to the Council for examination "

* Art 149
† Art 152
‡ Art 153
§ Art 154
|| Art 155
¶ Art 149

It is thus clear that apart from the local method of adjudication or arbitration which is not included in the general Treaty procedure of the Council the direct method differs from the provisions contained in the Polish or other Minorities Treaties in two important respects First the right of petition in Upper Silesia is restricted to members belonging to the minority community unlike in the case of other European Treaties under which the right may be exercised by any person or a group of persons provided the conditions of receivability are fulfilled Secondly petitions under the provisions of the German Polish Convention go immediately before the Council while according to the Minorities Treaties the Council takes cognisance of the petitions when a member thereof raises the question at its meetings As pointed out in *Ten Years of World Co operation* the German Polish procedure led to the inclusion in the Council agenda of an enormously large number of petitions from Upper Siles a many of which were not of such a grave nature as to warrant the *intervention or even examination by the* Council * In April 1929 however in order to put an end to this sort of unnecessary harassment to the Council the German and Polish Governments arrived at an understanding simplifying and improving the local procedure The agreement reached has conferred upon the Council Rapporteur power to decide with the consent and approval of his colleagues which of the decisions should be forwarded to the Council It must be borne in mind that the general conditions of receivability of a petition except that relating to the source of its origin apply in the case of Upper Silesia also The procedure under the Convention differs in certain important respects in its preliminary stages from the ordinary procedure followed under the Treaties as has been sought to be made out in the preceding pages But once the Council has been seised of the business the line of demarcation fades away and there is no sufficient reason for keeping the two classes of cases completely separate

The special procedure followed in regard to Upper Silesia gives rise to an unwieldly agenda before the Council

* Ten Years of World Co-operation p 374

To sum up The Council has constantly felt while dealing with the problem of minorities that it is one thing to lay down provisions in an International Treaty and it is quite another thing to give effect to them Since the inauguration of the system after the Great European War it has spared no effort to make the machinery for enforcement of the obligations and responsibilities by which the Succession States are bound, as effective as possible Attention may be drawn, for the purposes of illustration, to the Tittoni Report adopted by the Council on October 22, 1920, the Council resolution of October 25, 1920, the Council resolution of June 27, 1921, the Council resolution of September 5, 1923, the Council resolution of June 10, 1925, the Council resolution of June, 13, 1929, and the Adactci Report submitted in 1929 All these documents deal with the procedure of League supervision and control and are collected along with the discussions on them in League Document C 8, M 5, 1931, I

Different stages of national adjustment

There are three main stages through which a minorities question has to pass after it has been taken note of by the Council These stages may be called investigation, persuasion and settlement The principal object of the Minorities Treaties is to bring about conditions of stability and peace in the Succession States of Europe by avoiding or eliminating the possibility of inter-State antagonism arising from the oppression of minorities Experience shows that certain States have attempted to have recourse to Articles 11 and 15 of the Covenant which provide for the settlement of inter-State disputes even when the questions involved were directly and principally concerned with the protection of minorities stipulated in the Treaties Very rightly, the Council has sought to frustrate these attempts by resort to the special procedure provided for in the Treaties

Conclusions

But there is another aspect of the problem which cannot be ignored If it is suspected by the States concerned that the League has neither the will nor the capacity to enforce the guarantees in a spirit of detachment and impartiality, there is hardly any doubt that the moral authority of the League will be considerably

impaired Again it will prove its worthlessness if it is found out that the object of its diverting genuine inter State disputes to the minorities procedure is not to settle but to evade the delicate and complicated issues which may arise from time to time As a writer has pointed out A State will consent to waive its quarrel if, and only if, it can feel assured that the legal rights which are subject of the quarrel will nevertheless be safeguarded * A guarantee is not enough nor can a machinery set up to enforce it serve the purpose for which it is intended unless the guarantors wake up to their responsibilities The Council has taken upon itself very onerous obligations but no less onerous are the obligations of its constituent members Sometimes it has been felt that States not directly interested in the question of minorities protection do not take their responsibilities seriously and seek instead to throw the burden entirely on the State or States concerned Such an attitude it is difficult to justify and dangerous to adopt for it tends ultimately to give issues relating to minorities protection the character and complexion of inter State disputes which the Treaties are intended to avert Mr Henderson gave on behalf of Great Britain a wise and courageous lead in this direction in the well known Polish elections case of 1931

Co-operation is undoubtedly a better method than coercion But it is after all a method a means to an end and not an end in itself And it is wrong to mistake a means for an end If co operation does not succeed attempts to secure for minorities the rights guaranteed to them under an international instrument must not be given up in despair Persuasion may be carried to an excess and it is a scandal that about two years were spent in attempting to solve the German settlers case in Poland by a method of fruitless persuasion In defiance of the earnest efforts on the part of the Council the Polish Government carried out its scheme of expropriation in the case of at least 2 000 out of 3 000 German settlers involved If a case like this comes up before the Council and if it is not possible to settle it immediately or within reason

* Julius Stone: International Guarantees of Minority Rights p 265

able time, it is its paramount duty to compel the State or States concerned to maintain the *status quo* where there is no assurance that the violation of the rights of minorities will be adequately compensated. In no case shall the State or States be permitted during the period of negotiations to carry out its or their intentions which form the subject-matter of dispute before the League and create *faits accomplis* and produce them before the League to prejudice the case of minorities. If the League fails to show courage and determination in such a case, the proceeding before it is likely to prove at best meaningless and at worst a mockery

It has been pointed out that one of the great achievements of the post-War settlements in respect of minorities protection is the introduction of the judicial element into the sphere of League supervision and control Every care was taken to state the rights of minorities under the Treaties in a language susceptible to juridical treatment A Permanent Court of International Justice has been created for the purpose and its range of jurisdiction has been clearly defined. It was claimed by M Clemenceau in his letter to the Polish delegate that the judicial machinery is the main pillar on which the system of minorities protection rests. But if form is to be distinguished from substance, it cannot be said that the hopes raised in 1919 have been fulfilled and the promises all redeemed. Decisions delivered by the Court of International Justice have been used generally for the purpose of securing co-operation rather than of deciding the points at issue once and for all This has robbed the judicial decisions of the force and sanctity which ought to attach to them It may be said in reply that allowance must be made for the existing circumstances and the temper of nations While that contention is perfectly reasonable in view of the present state of things, it is necessary to make the States bound by international obligations realise that the judicial machinery for the enforcement of those obligations is an essential and vital part of the system inaugurated under the Treaties of Peace In other words, the League should see that the decisions of the Court of International Justice on questions which are referred to it occupy a conclusive part of the system. Furthermore, the judicial machinery should be utilised for the purposes of minorities protection as readily as possible and without

any mental reserve, and there should be no reluctance to call in its aid in defence of the rights of minorities guaranteed in the Treaties

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CHAPTER VI.

THE ACHIEVEMENTS OF THE LEAGUE

The League's guarantee exclusively for minorities

The Treaties, as we have seen in the preceding chapter, have not only laid down provisions stating rights for minorities but have also stipulated that the protection clauses constitute obligations of international concern and that they shall be under the guarantee of the League of Nations The League cannot however act if any Treaty Government infringe any of the provisions to the prejudice of a majority community, for the League's guarantee is not intended for the latter but solely and exclusively for minorities The provision regarding the guarantee has made it clear how the Council of the League may be notified of any violation or infringement of the clauses and when and to what extent the Council can take action Should any differences arise as to law and fact between the parties concerned, the points of dispute, at the instance of either party, may be referred to the Court of International Justice whose decision in certain cases must be final and conclusive

The object aimed at is reconciliation

The Council itself has provided a machinery of control and supervision within the framework of the Treaties enabling the minorities to appeal to the League by means of petitions and to secure consideration of their petitions by a suitable body With that end in view, provision has been made for the constitution of the Minorities Committees and conditions regarding the admissibility of petitions have been laid down The procedure as it prevails to-day was not established all at once, it is the result of experience and has been adapted from time to time to the needs and circumstances as they arise The system is not intended to lay undue emphasis on the points of difference between a Government and its aggrieved minority The object is

to bring about reconciliation between the parties by discussions and friendly negotiations, and only in exceptional cases, to refer to the International Court for final judicial arbitration In no case are frivolous petitions or appeals by the minorities direct to a foreign Power encouraged Such attempts are bound to be interpreted by the Governments concerned as being acts of disloyalty on the part of the minorities which it is the duty of the Council to prevent These are moreover incompatible with the ideas and principles underlying the present organisation of States The Powers are not permitted to intervene singly but only in the name and under the auspices of the League Nor is interference permissible or justified save in matters specifically mentioned in the Treaties and according to the procedure laid down Thus the juridical aspect of the League s supervision is emphasised How far the League has succeeded by that procedure in securing protection for the minorities in Europe to which under the guarantee they are entitled it is now for us to investigate In this chapter therefore we propose to give a short review of some typical cases which have been disposed of and the points of dispute involved therein The review is not intended to be exhaustive the idea is to illustrate the principle which has been accepted by the League in regard to the protection of minorities

Disputes before the League and the number of cases decided

Altogether some three hundred and fifty petitions have been communicated to the League since 1921 * This number of course excludes petitions received from Upper Silesia Of these cases almost fifty per cent were dismissed as having failed to satisfy the conditions of admissibility laid down by the Council Again most of these cases were settled by the Minorities Committees themselves and only fifteen cases were put on the agenda of the Council and dealt with by it showing that only in exceptional cases was intervention on the part of the Council needed for the purpose of settling disputes arising out of the Minorities clauses On two occasions the opinion of the Permanent Court of International Justice was sought on points of law

* The figure has considerably mounted up since the book was written.

The issues involved

Disputes in most of the cases arose out of questions relating to the acquisition of nationality, the use of the minority languages, provisions for education for the children of minorities, personal liberty, freedom of worship and equality of treatment in law and in fact under the agrarian laws introduced in some of the newly created States

In Poland two important cases arose regarding the acquisition of Polish nationality and liquidation of property of Polish nationals* Both these points were settled by means of direct negotiations between the Governments concerned under the direction of the League of Nations

Acquisition of citizenship and the right of option in Poland

Attempts were first made through the instrument of a Convention to decide points in connection with the acquisition of citizenship and the right of option Those attempts failed because of acute differences of opinion between the German and Polish Governments Ultimately in June, 1924, M Kaeckenbeek, President of the Upper Silesian Mixed Arbitral Tribunal, gave his award with regard to the issues raised He decided that the possession of two domiciles did not disqualify persons from Polish nationality Continuity of residence in Poland was not deemed essential, although the continuous possession of domicile was insisted upon Germany's contention that *optants* for Germany were not under obligation to leave Poland was rejected It was further decided that persons who left Poland for good after the Treaty had come into force and those who settled in other countries and not returned to Poland during the four and half years since the conclusion of the Treaty ought to be presumed to have given up their claim to Polish nationality They were, however, given some time in which to express their definite view whether they wanted to retain it or not On the basis of the award a Convention was drawn up and signed in August, 1924, at Vienna and subsequently ratified at Warsaw in 1925 The term " habitual residence " was defined and details were drawn up indicating what action might be interpreted as giving rise to a

* See the Permanent Court of International Justice, Series C, C J, November, 1923, *ibid*, February, 1924

presumption of abandonment of residence The optants were given the right to take their property along with them, and reasonable time was allowed between the declaration of option and the transference of residence Those persons who had settled outside Poland and not returned before July, 1924, were presumed to have given up the Polish nationality unless they definitely claimed it and had a parent resident in Posen

The Polish Land Settlements.

A more important question raised was with regard to land settlements A telegram was addressed to the Council of the League of Nations by the Germanic League for the protection of minorities in Poland, appealing on behalf of thousands of peasant families of German origin who had been ordered by the Polish Government to leave their Polish homes This scheme of the Polish Government may be traced to the Bismarckian policy of Prussianisation adopted for the first time in 1886 and sought to be carried out to its logical conclusion in the years immediately preceding 1914 As Miss Mair puts it, this policy consisted in the systematic settlement of German colonists throughout Prussian Poland on land bought up and leased out to them by a Commission appointed for the purpose * The Polish Government were anxious to restore such lands to Polish owners and thought that in so doing they were simply righting a palpable wrong which had been in existence for generations A large number of evictions were made And when the matter was brought before the Council of the League the Polish Government opposed the complaint on the ground that it was beyond the jurisdiction of the Council The question was then referred to the Court of International Justice which expressed the view that Poland had no right to call in question the competency of the League † The Court held also that Poland s action in evicting the German colonists was not in accord with her international obligations The view was further expressed that the residence of a person s parents in Poland on January 10 1920 could not be made a condition precedent to the acquisition of Polish nationality The Polish Government refused to accept the competence of the Council in the matter and

* Miss Mair: The Protection of Minorities, p 77

† See the Permanent Court of International Justice Series E

abide by the declaration of the Court They were however willing to find out a practical solution of the question They said that their orders for evictions were final, but that they were prepared to pay some sort of compensation to the colonists who had been affected by those orders and to withdraw the orders of expulsion against those in respect of whom judgment had yet to be executed After a prolonged discussion in the Council in which Lord Robert Cecil took a very prominent part, it was agreed that the Council should reserve to itself the right to insist on the withdrawal or expulsion orders provided no agreed solution could be arrived at between the parties in regard to compensation The terms of compromise regarding compensation were discussed and considered by the Polish representative on the one hand and the Council's Sub-committee of three on the other It was decided that a lump sum should be fixed for the purpose of awarding compensation, that sum being increased or diminished according as the number of persons concerned was greater or less than 500 * The average payment proposed to be made to each German affected was fixed at a minimum sum of £ 220 The persons who could claim Polish nationality on the day when the Land Law was passed were entitled to this consideration This settlement was confirmed by the Council in June, 1924, and the first payment was made by the Polish Government in the course of a month Under the terms of the agreement the Polish Government distributed to 500 German settlers of Polish nationality compensation to the extent of 2,700,000 zloty (gold franc). †

The Language Laws in Poland

Provisions made with regard to the application of language laws‡ deserve careful study On November 19, 1926, a circular was issued by the Polish Government in the Ministry of Education indicating its desire to give effect to the language laws of 1924 The directors of schools were informed that the educational institutions under their control and management must be conducted in the interests of all citizens without distinction of religion or race They were told also that an attempt should be made to compel

* O J , July, 1924

† Ten Years of World Co operation, p 375

‡ *Cf* Grabaki Laws issued in 1924

children belonging to the minorities to assimilate Polish culture and learn the Polish language School teachers were enjoined to acquire knowledge of local languages so that there might be no difficulty *on their part to talk with the scholars in the latter's* mother tongue In communications with the authorities and as a medium of instruction in schools the use of minority languages including *Yiddish* was admitted and recognised in a circular issued in February, 1927

Protection for the Polish Jews.

Then according to an agreement arrived at by the Jewish representatives in consultation with M Grabaski, representing the Polish government, *certain concessions were extended to* the Jews which may be divided into four sections, *viz* economic, political cultural and religious All restrictions which had been imposed upon the Jews in respect of the formation of trade guilds, co-operative associations and chambers of commerce were abolished The Jews were exempted from the Sunday closing law No discrimination was to be permitted against them in trade and industry and in the matter of the regulation of monopoly concessions They were to be admitted in due proportions to public employments, and non-commissioned ranks in the army were thrown open to them Government schools were to be set up with Jewish as a language of instruction and hours set apart for Jewish studies Subsidies were to be specially provided for particularly deserving professional schools Jewish school children were not to be compelled to do any work on their *sabbath* day or on the occasion of other Jewish festivals They were to be allowed to attend their own prayers and the Jewish soldiers were to be released from duties during religious ceremonies

On July 11 1925, a part of this agreement embodied in a series of regulations was submitted to the Cabinet and accepted by them only five days later The resolutions thus homologated however, contained none of the economic provisions *

Complaints by the minorities in Czecho-Slovakia.

The problem of the minorities in Czecho-Slovakia is reported to have been solved satisfactorily Such a view has been taken by no less a distinguished authority than *Professor Gilbert Murray*

* Miss Mair The Protection of Minorities pp 96-98.

and is supported by the policy adopted by Masaryk to which reference has already been made * In April, 1922, the German Minority in Czecho-Slovakia submitted a petition enclosing a detailed list of their grievances † The petitioners pointed out that their community was not represented adequately on the Constituent Assembly, that owing to the Czech language being used for discussions in the Assembly the German representation was practically ineffective, that the language law of February 29, 1920, permitting the use of minority languages in official business in districts where twenty per cent of the population belonged to the minorities ran counter to the provisions of the Treaty, that the German minority were forced to use the Czech language in telephone, advertisements, etc , and that the fact of the landed property exceeding 150 hectares having been placed under the State administration showed that the intention of the Government was to transfer the entire land of that size from the German to the Czechs.

The reply of the Czecho-Slovak Government

The Czecho-Slovak Government stated in reply that the Germans were not represented on the Constituent Assembly because of their refusal to be so represented They had, however, more than their proportionate share of representation on the National Assembly which meant that they could alter the composition of the Constituent Assembly, if they liked Of course, Czech was treated as the official language in deliberations in the Assembly, but the minorities were permitted to speak their own languages on the floor of the Assembly The Government insisted upon a minimum of 20 per cent of the total population in regard to certain minority privileges inasmuch as it was administratively impracticable and inconvenient to consider the claims in this regard of isolated individuals belonging to the minorities and scattered over large tracts of territories Special care was taken to see that the telephone numbers called in German were dealt with by operators knowing both the Czech and German languages The land reform, the Government added, had nothing to do with the oppression of the German minority, it was undertaken and

* *Supra*, Chap IV
† C 568, M 389, 1922 I.

carried out with a view to the equitable distribution of lands among the peasants irrespective of their race or religion

The German minority in Czecho-Slovakia associated with the administration

We have already referred to President Masaryk s observations with regard to the facilities his Government placed at the disposal of the minorities One or two sentences in which the policy of minorities protection adopted by the Czecho-Slovak Government is reviewed by him may be added Our policy towards the minorities, Masaryk told a correspondent of the *Daily Telegraph* on October 25, 1926 can only be one of absolute justice and equity And by that I mean not only that they must be free from oppression but that they must have a share on terms of full equality in the positive benefactions of Government He pointed out that in Czecho-Slovakia protection of the culture and languages of minorities was not a serious problem for that problem had already been solved by the Minorities Treaty The question with the minorities was actual share in the entire Government and in the control of the destiny not only of the persons belonging to smaller communities but of the whole country Masaryk made it clear that they ' possessed all the necessary conditions for this in Czecho-Slovakia

There was reluctance at first on the part of the minorities to share tne burden and responsibilities of government They continued to be in the position of a permanent opposition But that feeling did not last long for the Cabinet formed in October 1926 included two Germans as Ministers one being in charge of Justice and the other of Labour There is therefore no denying the fact that Professor Gilbert Murray is right in thinking that the actual position of the minorities in Czecho-Slovakia is on the whole satisfactory

Arrangements in the Baltic States provisions made in the Hungarian Laws.

Steps have also been taken in Austria Hungary and Roumania to enforce the provisions of the Minorities Treaties and pass laws bye-laws and regulations thereunder providing for the protection of the minority interests in respect of language, racial peculiarities observance of religious rites and forms of worship Complaints have now and then been addressed to the League by the representatives of minorities and in most

cases, the points of difference have been amicably settled between the minorities themselves and their respective Governments To take a specific case, the legislative enactments of the Hungarian Government relating to language are based on large-hearted sympathy and broadminded statesmanship.* Under those laws twenty per cent of the population is treated as constituting a considerable proportion establishing a claim to recognition, and in districts where there is a minority of that size the Government officials, both of the executive and the judiciary, and the Municipal authorities are required to speak the minority languages The free use of minority languages is guaranteed in private intercourse, in commerce, in religion, in the press, in public meetings and in communications with the State and Municipal authorities

The oppression of the German minorities in Upper Silesia

Much as one would appreciate the splendid and magnificent work done on behalf of the minorities in Central and Eastern Europe through the intervention of the League of Nations, the picture is not complete unless one reviews in some detail the complaints that have been published throughout the world regarding repressive acts to which the minorities have been subjected in some parts of Poland and in Upper Silesia On December 3, 1930, the Berlin correspondent of a Calcutta nationalist daily† discussed the position of the German minority in Upper Silesia Terrible assaults, the correspondent pointed out, had been committed upon the Germans, their property in some places had been looted and excesses of various kinds had been resorted to by the Polish nationals The German Government took a serious view of the situation and the German Consul at Kattowitz was asked to draw up a full report of the excesses On the receipt of the Consul's report the German Government decided to make a representation to the League Council for necessary action

The German reprisals against the Poles

The Polish papers pointed out that proceedings had been taken against those responsible for the outrages, that a number of arrests had been made and that 3,500 zlotys had been earmarked as compensation for the victims Polish excesses against

* *Advance*, Dec 26, 1930

† O J, August, 1925

Germans have in the past prompted some of the German nationalist newspapers to call for reprisals It may be remembered that the Polish minority in Germany is very small and quite inoffensive and had no cause for complaint till the excesses in Upper Silesia were broadcast The situation seems to have changed as Von Gerlech, a distinguished German pacifist admits According to him in a certain district 400 members of the Stanlehelm broke up a Polish children s festival, tearing down flags and doing damage to the Polish schools besides assaulting individuals In another district a meeting organised by the Poles was broken up by Hitlerites and still, in a third district, a Polish child was hit by a German and further again the windows of a Polish school were smashed and individual Polish citizens were assaulted by the Nazis

A Socialist newspaper blames Europe.

A Socialist newspaper in Germany sounded a note of warning in the course of a leading article and observed that the rabid nationalists on both sides of the German Polish Frontier might any day come to blows and create a frontier disturbance That newspaper further observed that the Germans should not think of the German minority in Poland alone because the fate of the Ukranian minority was even more intolerable and that if the Council did not do anything the protection of minorities would be reduced to a mere farce The paper concluded that it was not Pilsudski who was alone responsible Europe we are told is also responsible specially the Great Powers who created Poland as an independent State

The view expressed in Berlin has been confirmed and strengthened by the *New Statesman* and *Nation* which published a few months later a lengthy article on the oppression in Poland It wrote

A graphic description in the British Press.

> The facts about the pacification of Eastern Galicia are now so familiar and so indubitably established that they need not be repeated here The outrages committed in Polish Upper Silesia are equally familiar Well known too are the attempts at denial first and then when denial was found to be useless at excuse and palliation—the wretched stuff produced by the Polish Press

> Bureau in London for example, and the frothy stream of propaganda that pours down on newspaper offices and on members of Parliament Less familiar is the terrorisation of the white Russian minority by the Poles, though it may not always remain so, for a primitive peasant population that is hardly aware of the League's existence and has never had any experience of democratic institution may find other and more dramatic means of calling the world s attention to its wrongs But whether familiar or not, the facts are there Some of them—for example, the Silesian outrages—have been established by the League itself And yet the violations go on as though the Minorities Treaty, the League and public opinion did not exist Even the rulings of the Polish Court will sometimes flout the Treaty One only has to imagine what would happen if Germany were to pass a law contravening the Treaty of Versailles, to realise that there are still two measures of international Justice to-day one for the victors, another for the vanquished . But apart from any judicial considerations, how can there be any confidence in Poland's future if the minority—who make up a third of her population—are driven to think only one thought above all other thoughts, namely, how to shake off intolerable oppression?

The allegations made in the *New Statesman* and *Nation* quoted above are serious in all conscience They are allegations not only against the Polish Government but also against the League of Nations It is apprehended that if the present state of things continues with impunity in Upper Silesia the result would be disastrous Poland is a new State which has been created under the provisions of the Versailles Treaty. Obligations were imposed on her, when extensive territories were assigned to her, to give adequate protection to her nationals belonging to racial, linguistic and religious minorities, particularly the Germans Her future depends to a considerable extent on the manner in which those obligations are discharged The presence in her territory of a permanent community like the Germans groaning under wrongs is a menace to her stability as a State, if not to her very existence She is on her trial The German-Polish Convention for Upper Silesia which contains a larger number of provisions for minorities protection than any other Minorities Treaty is an indication of the nature and extent of the League's

anxiety regarding the position of the minorities in the Plebiscite territory It is the duty of the League to make its guarantees real If that duty is not adequately and effectively discharged, a spirit of indiscipline is bound to ensue in Germany and other parts of Europe Germany may be induced to think that her remedy in the circumstances lies in appeal to force and abrogation of the Versailles Treaty Such a state of mind will give rise to complicated issues in Europe It is the business of the League to prevent this state of things from developing

That the situation in Upper Silesia is far from satisfactory is admitted on all hands It is proved by the abnormally large number of petitions that come up before the League of Nations on behalf of the German* and Polish minorities in the Plebiscite territory Some of the petitions go before the Council and a larger number are dismissed for some reason or other There have been in all about 60 Upper Silesian petitions on the Council's agenda 45 from Polish and 15 from German Upper Silesia †

Charges made in the German petitions against the Polish Government are of a much graver nature than those made in the Polish petitions against the German Government Most of the petitions deal with grievances of the minorities in regard to the violation of educational religious and linguistic clauses of minorities protection Some of the recent cases which were brought before the Council raised the question of admission to German Primary Minority Schools ‡ acts of terrorism especially by the *Union of Insurgents* which had deliberately planned and carried out a campaign against the Germans § the Polish elections of 1930 ‖ the situation of the German minority in the Voivodie of Upper Silesia ¶ and of that in the Voivodies of Poznan and Pomorze the liquidation by the Polish Government of the pro-

* A useful tabulation of petitions Upper Silesian and other is to be found in Von Truhart's *Volkerbund und Minderheiten—petitionen.*

† The German Government has informed the Hague Court that as a result of Germany's withdrawal from the League of Nations it had no interest in prosecuting its action before the Court against Poland which includes a complaint against the treatment of German minorities in Poland.

‡ O.J April 1927

§ O.J February 1931

‖ O.J February 1931.

¶ O.J November 1930

perty of a number of Polish nationals belonging to the German minority* and the non-renewal of contracts of 32 doctors by the management of Spolka Bracks at Tarnowskie-Gory † These cases are illustrative and by no means exhaustive

An analysis of some of these important cases seems to be called for Taking the consolidated case arising out of the Polish elections of 1930, which merits close attention, we find that in their seising letters the German Government alleged that a large section of the German minority had been deliberately prevented by arbitrary measures of the authorities from exercising their right to vote, and even when able to use it, could not record its vote by secret ballot and that they had been subjected to a reign of terror It was alleged further, that the highest official in Polish Upper Silesia was the Honorary President of the *Insurgents' Union* which was responsible for terroristic activities and many high officials were its leading members and that the police consistently neglected their duty by either not interfering at all or by taking very inadequate measures to prevent the violence to which the German minority had been subjected These facts were exhaustively supplemented by a petition from the *Deutscher Volksbund* under Article 147 of the Upper Silesian Convention It called upon the Council to resolve ‡

The consolidated Polish elections case

(1) That Article 75 (dealing with civil and political equality, equality before the law, and equal treatment by the authorities) and Article 83 (assuring full protection of life and liberty) of the Geneva Convention had been violated,

(2) That the Polish Government should take such steps against the authorities responsible for permitting the violation as would demonstrate to the Polish and German populations that there could be no repetitions of such offences and

(3) That the Polish Government should examine whether the privileged position of the *Union of Insurgents* could be maintained §

* O J , July, 1929, and O J , February, 1931
† O J , June and November, 1930
‡ O J , February, 1931
§ O J , February, 1931

As regards Poznan and Pomorze it was alleged in the German note of December, 1930, that large numbers of the German minority were excluded from the exercise of their votes by arbitrary action on the part of the Polish authorities which cannot be reconciled with the existing regulations Where the minority was able to exercise their votes the free expression of their wishes was subjected to the most powerful pressure This conflicts with Article 7 of the Polish Minorities Treaty *

The Polish Government in reply stated in the course of a letter, dated January 6, 1931, that the minority had not been deprived of electoral freedom arbitrarily They admitted, however, that disorders had taken place but denied that they were more serious than those incidental to important elections elsewhere and promised that all complaints would be investigated that public officials implicated would be punished and that injured persons would be compensated †

On January 21 1931 M Zaleski referring to the Volksbund petition regarding the election disorders in Upper Silesia, declared that

(1) The incidents in connection with which the memorandum affirms that Articles 75 and 83 have been violated are primarily offences against Polish legislation and proceedings have been taken against the offenders

(2) *Again in conformity with the second of the conclusions in the* memorandum severe penalties have been inflicted on the officials incriminated Indemnities have been allowed in all cases where real damage has been shown.

(3) As regards conclusion 3 concerning the Insurgents Union I wish to declare that to my knowledge this Union occupies no special or privileged position In its anxiety to maintain public order my Government will not tolerate any effort on the part of a private association to arrogate special rights or occupy a dominant position.

The Polish Government will use every means within its power to bring about peace and tranquillity in Upper Silesia. It has acted with severity and will continue to do so against all instigators of disorder whatever their origin.

* O.J February 1931.
† O.J February 1931.

It will thus appear that there was no substantial disagreement as to the truth of the allegation that there had been infractions of the relevant clauses in the Convention, nor as to the need for action by the League to safeguard the interests of minorities But the immediate question for determination by the Council was whether the assurances of the Polish Government could be considered adequate reparation for every part of the wrong which had been committed "The Council," it was observed, "must take all measures that the position may call for in order to ensure that reparation is actually effected Precautions must be taken to prevent the recurrence of similar incidents The Council will have to go thoroughly into the question of the *Insurgents' Union* and its relations with official circles"

In his report, dated the 24th of January, 1931, M Yoshizawa, the Council Rapporteur, remarked that the responsibility of the authorities was twofold, direct and indirect As regards the direct responsibility, he expressed the view that the Council ought to receive from the Polish Government before its next session a complete and detailed statement of the results of the enquiries set up to invesigate into these cases, and also of the penalties imposed on the offenders and measures of compensation that might have been taken As regards the indirect responsibility, the Rapporteur stressed *apropos* of the alleged activities of the *Insurgents' Union* that "it is obvious that in regions like Upper Silesia with a mixed population, no association with an accentuated national tendency should occupy a privileged position of such a kind as to prejudice the interests of the minority The Polish Government should take the steps required to remove any special connection that might exist between the authorities and the associations engaged in political activities, such as the association referred to
The Council will certainly desire to be informed in due time before its next session of any decision which the Polish Government has felt right to take in this matter "†

The question came up before the Council in its May session The Polish Government communicated the information desired in

* See Speech if Dr Curtius (O J , February, 1931)
† O J , February, 1931, p 237

a letter, dated the 14th of May, 1931, which reached the members of the Council in the course of the session Regarding the contents of that letter the Repporteur observed that the measures reported by the Polish Government did not include the one which in the opinion of certain members of the Council, would have afforded the most appropriate and effective means of severing such special bonds as might exist between the authority and the *Insurgents Union* This statement shows that the Polish reply was not deemed satisfactory so far as the charge of the Polish officials connection with the Union was concerned The Rapporteur recorded however that there had been real and definite relaxation of the tension and a very marked improvement in the relations between the authorities and the minorities, and suggested *inter alia* that the Council should close its examination of the matter * The proposal came as a surprise upon some members of the Council particularly Dr Curtius He made it clear that the results of the Council s action were neither clear nor adequate so as to warrant optimism The attitude of Dr Curtius gave rise to a heated debate in which the representatives of Poland France and Yugo-Slavia fought for the adoption of the Report The Polish representative went so far as to hold out a threat to the Council He was authorised to state observed M Sokal that the Polish Government would decline all responsibility if the Council having decided in favour of adjournment any further tension arose † This indiscreet observation made by the Polish representative provoked a sharp rebuke from Mr Henderson the Acting President of the Council Mr Henderson declared that he was not in a position to satisfy himself that the information given was complete enough and sufficiently satisfactory in character to enable him to say that the Council was now entitled to dismiss the question entirely from its agenda ‡

The Council s action hasty and ill-advised.

The matter was then adjourned to the September session of the Council In that session however a unanimous

* O.J July 1931.
† O.J July 1931 p 1140
‡ O.J July 1931 p 1160

former national who have under the Minorities Treaties been transferred to a different Government In the latter case, it may be recalled, the deputies of the Polish Seijm raised the question of liquidation by the Polish Government of the property of a number of Polish nationals belonging to the German minority * It was pointed out in the petition that the matter was very urgent but the observations of the Polish Government on the allegations made in the petition did not reach the Council until about four months later,† *i e*, the 5th of June On the 7th June the petition and observations thereon were communicated to the members of the Council then in session at Madrid On the 8th June the late Dr Stresemann addressed a letter to the Secretary General in which he said

The petitioners submit that the petition is urgent According to information published by the Polish Government, measures for the execution of the liquidation have already been instituted I consider therefore that the matter calls for urgent treatment For this reason I have felt compelled not to await the usual procedure before a Committee of Three

In accordance with paragraph 2 Article XII of the Treaty between the Allied and Associated Powers and Poland, I have the honour to request that the petition be placed on the agenda of the Council of the League

The President of the Council, M Adactci read out Dr Stresemann s letter and the Council decided on June 10 that the petition should be placed on the agenda It is therefore clear that Germany was the seising member

Thus in the Polish elections case of 1930 Germany did not wait for the minority lodging a petition of complaint and seising the Council by normal procedure This somewhat extraordinary procedure called forth an angry protest from the Polish representative The German Government, wrote M Zaleski has not hesitated to give to its action the character of a subjective and political intervention The

* O.J July 1929

† The petition was dated the 25th September 1929

German Government has itself altered the moral and legal basis of its action and described its Notes as 'Complaints,' these Notes although forwarded direct by the Reich Diplomatic Representatives to the Governments-Member of the Council independently of the official distribution, should, none the less, have retained the character of communications made by a member of the Council to the Secretary-General."*

M Zaleski persistently stressed this point of view and made it clear that although he was furnished with Notes from the German Government, he would take the memorandum addressed to the Council by the Volksbund representing the German minority in Poland as the basis for discussion Dr Curtius, however, replied to M Zaleski in the following terms:

> "While there is no doubt that we are acting in this matter in our capacity as members of the Council, and that our aim is to give more effect to the obligations assumed under the League's guarantee, we do not dream of denying that we are bound by close and intimate ties to the Germans who now live beyond our borders under foreign sovereignty But this deep sympathy on the part of Germany in no sense affects the fact that the Government of the Reich, in appealing to the League, has acted in accordance with the letter and the spirit of the existing law in respect of minorities I do not find a single argument to invalidate this point of view "†

The basis for discussion of the election cases of 1930 was of course the Volksbund petition, but there seems to be no reason to hold that individual seisin in cases of an urgent character will not be used for the purpose of protecting minorities But it cannot be ignored that in the cases under review the German Government and their representative in the Council were guided primarily by their interests in the fate of their former nationals It is significant that Dr Curtius admitted that they were bound by close and intimate ties to the Germans who now live beyond their border under foreign sovereignty While individual seisin cannot but be held to be a legitimate method, there must be some limit to the doctrine that any Government should have power to

* Letter, dated the 6th January, 1931.

† O J, February, 1931, p 166

interfere with the action of a neighbouring Government even for the protection of their former nationals Such intervention may be carried to absurd and dangerous lengths and may produce acute international conflicts The League should define the spheres in which such intervention would be permissible so that there should be no doubt as to the actual position of different Governments *inter se* regarding the question of minorities protection

The case concerning the admission of children to the Primary German Minority Schools in the Voivodie of Silesia which was considered by the Council in 1927 raised two questions, namely, (1) the consideration of the points of fact as well as of law involved in the petition and (2) the consideration of setting up of a supervisory machinery for settling doubtful cases in accordance with the decision of the Council It may be recalled that on September 25th 1926, the Deutscher Volksbund, an organization representing the German minority in Polish Upper Silesia, lodged their petition of complaint with the Polish Minorities office at Kattowitz, in accordance with Articles 149 157 of the Geneva Convention

As regards the facts of the case entries for new schools were received between June 20th and 26th, 1926 Two groups of pupils were entered

(*a*) children attending schools for the first time, and

(*b*) pupils who had previously attended the Polish schools and were being transferred to the German minority schools

In conformity with the notices issued by the Polish Voivoideship,* parents or guardians etc had to enter the names of their children or wards, verbally or in writing to the competent headmasters The total number of pupils entered for the minority schools was 8,829 according to the statements of the Minorities office and 8 560 according to those of the petitioners Some times after these entries were completed the supreme educational authority ordered an administrative enquiry for the purpose of

* Documents 45-48.

examining all parents and guardians who had entered children for the minority schools By order of the educational authorities, the enquiry was carried out in 67 communes In the course of their examination the parents and guardians had to state the mother-tongue of their children and also to declare whether they desired to enter their children for the German minority or for the Polish majority schools. They were asked further whether they recognised the signatures on the entry forms as their own and to point out in what form they had made written applications As a result of these enquiries the competent authorities declared 7,114 entries for the minority schools invalid for seven different reasons.

The issues raised in connection with the admission to primary schools of the Polish German children in Polish Upper Silesia

At the beginning of the academic year 1926-27 all the pupils whose entries had been declared invalid were excluded from minority schools Many of these children ceased to attend schools, their parents or guardians maintaining that in virtue of Article 131 and the practice of the Mixed Commission as recognised by the competent authorities they were not required to send to Polish schools their children or wards whom they had entered for minority schools Many of these parents or guardians as a consequence received summary police orders for neglecting to send their children to schools They appealed against these orders, but the local court at Krolewska-huta rejected the appeal of the parents concerned and sentenced them to fines for infringing the law on compulsory education

The petitioners then applied for findings on the following issues

"(a) The instructions of the Silesian Voivodieship declaring school entries invalid on the ground that the children entered do not belong to the linguistic minority are illegal "

"(b) The Silesian Voivodieship is under the obligation immediately to admit to the elementary minority schools all children regularly entered "

* O J , April, 1927, pp 491, 492

(c) The Silesian Voivodeship may not impose any penalties or resort to any compulsory measures either against the persons responsible for the education of children or against the children themselves until a final decision has been taken on the petition *

The petition was carefully considered by the Mixed Commission, and President Calonder expressed the view that (i) in view of Articles 75 and 131 of the Geneva Convention, the general administrative enquiry of the Summer of 1926 was not justified and (ii) certain entries for the minority schools were wrongfully rejected namely, all entries of children whose parents or guardians, upon examination, formally expressed the desire to send their children to the German minority schools irrespective of whether they stated the mother tongue to be Polish, German and Polish, or German all entries of children whose parents or guardians, upon examination, made no declaration as to schools they desired their children to attend irrespective of whether they stated their mother tongue to be Polish, German and Polish or German all entries of children whose parents or guardians upon examination, expressed the desire to have their children taught in German and Polish but did not specify whether they were to be taught in German minority schools or in Polish majority schools irrespective of whether they stated their mother tongue to be Polish German and Polish, or German the entries of 1 307 children whose parents or guardians did not respond to the summonses to appear for examination in the summer of 1926 and whose entries were annulled on that ground

The President of the Mixed Commission made it clear that all the children described above should immediately be admitted to the minority schools with the exception of those excluded on grounds that they did not possess Polish nationality, that they had been entered by persons not legally responsible for their education, that they did not belong to the school districts concerned, that they should have attended schools other than those for which entries had been made and that they were no longer subject to the obliga

* O.J April 1927 p. 402.

tion to attend schools under the law of compulsory education It was however added that the petitioners should submit special petitions with regard to children refused on those grounds

The view was further expressed by M Calonder that competent authorities should be requested to issue no police summonses for failure to comply with the law regarding attendance at school to parents or guardians of children who ought to be admitted to the minority schools The authorities were also requested to withdraw the summonses if the latter had not already been pronounced upon by the Court *

The contents of the Council decision and the inauguration of a system of enquiry

An appeal was however preferred before the Council of the League under Articles 149-157 of the Geneva Convention The Council appointed by its resolution of the 8th of March, 1927, the representatives of Italy and the Netherlands to assist M Urrutia, the Rapporteur, in the preparation of a report concerning the subject-matter of the appeal The Committee thus constituted examined the various aspects of the question and the Rapporteur submitted a draft resolution for acceptance by the Council The resolution directed the attention of the Polish Government to the desirability of not insisting upon the measures taken by its local authorities to exclude from minority schools the following categories of children for whom applications for admission had been received

(1) Those whose demands for admission invalidated because the parents or guardians did not comply with the invitation to appear at the enquiry held during the summer of 1926, and

(2) Those whose demands for admission invalidated on the ground that the children to be admitted whose mother-tongue was stated at the time of the enquiry to be both German and Polish, did not belong to the German minority

The desire was expressed that an opportunity should be given to children in these two categories to enter the minority schools

* O J , April, 1927, pp 503 504

as soon as possible and without fresh applications save when the child (*a*) did not possess Polish nationality, (*b*) was entered for the minority school by a person who was not legally responsible for his education, (*c*) did not belong to the school district concerned, (*d*) should have attended another school and (*e*) was no longer of compulsory school age

It was directed further that all proceedings should be suspended that might have been taken against any person responsible for the child s education because the child did not appear at the Polish school when he should have been admitted to a minority school

The resolution then recommended the institution of a system of enquiry into the concrete cases falling under the two categories named above which might appear doubtful to the Polish school authorities It was also suggested that a similar system of enquiry might be applied in the case of any fresh demands for the admission of children that might subsequently be received from persons legally responsible for their education in the event of such cases appearing doubtful to the Polish school authorities The object of the enquiry was to ascertain whether or not the child spoke the school language used in a minority school so that he could usefully attend that school

The method of enquiry laid down in the draft resolution was that in every doubtful case the Polish educational authorities should refer the matter to the President of the Mixed Commission assisted by a Swiss national who must be an expert in educational matters If in view of the expert s opinion as to the child s knowledge of German the President declared that it would be useless for the child to attend the minority school he should be excluded from the school This method of enquiry was also recommended to be applied in the case of children in respect of whom persons legally responsible for their education had declared at the enquiry held in 1926 that their mother tongue was Polish should these persons express a desire for such an enquiry In such cases children in question should be allowed to enter minority schools if, in view of the expert s opinion as to their knowledge of German the President declared that they could usefully be admitted to these schools

The procedural part of the resolution was to be treated as an exceptional measure to meet a *defacto* situation not covered by the Geneva Convention and not to be interpreted as in any way modifying the relevant provisions of that Convention.*

The Council accepted the resolution on March 12th, 1927. It is necessary in this connection to add a few words on the legal question which was left open by the Council Rapporteur and discussed by the President of the Council. From the legal standpoint, the President stressed *apropos* of Articles 74 and 131 of the Geneva Convention which have laid down that the statement of the children's parents may be neither verified nor contested that there could be no question " that even a child which knows no language but Polish, must be allowed admission to the minority school." He added that " the principle that the decision as to which school the child is to attend depends solely upon its parents' wishes must in future be rigidly maintained, irrespective of the language spoken by the child."† The legal issue was not, however, decided by the Council at that time, but the desire was expressed that should that position be called in question, Germany would be obliged to press for a fundamental and final decision with regard to it.

It is well known that the procedure recommended in the Council resolution was given effect in April, 1927, and a Swiss educational expert was appointed in the same month. But the machinery set up failed to solve satisfactorily the problems which had arisen in the Polish part of Upper Silesia. In February, 1928, the German Government being dissatisfied with its operation, had recourse to the legal right guaranteed to them by the President of the Council to reopen the questions of law involved.

The conflicts between Germany and Poland frequent and acute and their real causes

It appears, therefore, that the conflicts between Germans and Poles in the plebiscite territory and also in other German areas which have been transferred to Poland are as frequent as they are acute. With all their efforts the League has not yet been in a position to restore peace in those areas. There seems to be

* O J , April, 1927, p 401
† O J , April, 1927, p 402

lack of co-operation and neighbourliness between Poles and Germans This tension of feeling is to be traced to historical and political causes It may be noted that as the result of post-war reconstruction a large number of German districts including the administrative district of Posen and a part of Upper Silesia were transferred to Poland, an arrangement in which the Germans have acquiesced with the greatest reluctance

The German Census of 1910 has often been quoted to prove that West Prussia had never been an indisputably Polish area for according to that census out of a total population of 989 715 421 033 were Germans as against 439,014 Poles In the two administrative districts of Posen, *viz*, Bromberg and Posen Proper the Census returns revealed that in the former territory there were 315 945 Germans as against 377 245 Poles and in the latter there were 352,560 Germans as against 885,226 Poles, thus showing that in the district of Posen Proper only there was a large Polish majority Upper Silesia is ethnographically a mixed area In certain areas the German culture is predominant while in others it is the Polish culture that holds sway It is however difficult to estimate the comparative strength of the German and Polish populations because the statistics given by the two parties do not correspond and are not therefore reliable But it is a fact that when the plebiscite was taken in 1921 a considerable majority voted for Germany The Germans claim that it was a 60 per cent majority for them Generally, the rural areas voted for Poland while the town and industrial centres voted for Germany It is also alleged that considerable French pressure was brought to bear upon the voting as against the Germans

In a book entitled *Sufferings of Eastern Russia* by F Warner it is stated that by the Treaty of Versailles Germany lost in the East 5 100 000 hectares (13 770 000 acres) of territory or 28 per cent of the total and 4 375 000 inhabitants or 31 per cent. of the total population In other words Germany lost more than ¼ of its area almost ⅓ of its producing power, including in Upper Silesia 53 hard coal mines (of a total of 67), 10 zinc and lead mines (of 15) 22 blast furnaces (of 25) 9 steel works (of 12) and 9 rolling mills (of 12) The loss seems to be appall

ing, but some allowance must be made for the fact that the book referred to is one of a series of propagandist literature that Germany has been publishing since the conclusion of the Treaty of Versailles. There can, however, be no denying that Germany has been afflicted by a sense of grievous wrong. This in a large measure explains the strained relations between Germans and Poles on the frontier and in several German districts assigned to Poland.

It is generally admitted that there are no longer as many Germans living in Poland as the Census figures taken in 1910 indicate. There have been large migrations since partly on account of the anti-German policy of the Polish Government and partly on account of the anxiety on the part of the Germans to settle down under their own Government. It is significant to note that in the two Voivodeships of Pomerellen and Posen the number of votes polled for German lists at elections rose from 169,209 in 1922 to 187,217 in 1928, the number of German members of Parliament rising from 3 to 7. It is also claimed that in the last Municipal elections about 45 per cent. of the votes polled were cast for German lists. Besides, there is a big German majority in the industrial district around Kattowitz and that fact is not seriously contested by the Polish authorities. According to the recent Polish census returns, 69.2 per cent. of the population belong to the Polish race and 63.8 per cent. to the Roman Catholic Church, while the Germans claim that at least 40 per cent. of the population of Poland belong to the national minorities.* As has been pointed out, these conflicting figures cannot be relied upon in their entirety, but the fact that the Allied Powers found it necessary to impose on Poland international obligations of minorities protection amounted to recognition by them of the existence of a considerable minority in that State.

The German view regarding Upper Silesia is that there is no racial division of nationalities there. The Upper Silesian, it is contended, regards himself primarily as an Upper Silesian. Economic, religious and cultural considerations determine his

* Dr. Axel Schmidt. The Germans in Poland, p. 8.

political affiliations * Upper Silesia had been politically severed from Poland centuries ago It is true that it owes its economic and cultural development to Germany to a considerable extent but it is also true that this was brought about at the cost of Polish national consciousness Reference may be made to the German Colonization Scheme under which a Commission set up for the purpose not only had power to expropriate land-owners but exercised that power freely and indiscriminately with the result that the Germans benefited at the expense of the Poles And that seems to be the reason why the Polish Government have excluded from the rights of citizenship those Germans who were settled in Polish districts in accordance with the Colonization Scheme

The Germans allege, on the other hand that the effective denial of equality of rights is not confined to educational matters It extends to the whole of public life, and in support attention is drawn to the dissolution of the German organizations in Poland the exclusion of Germans from public offices, the pressure brought upon industrial concerns not to employ German employees the differential treatment accorded to them in the matter of contracts State subsidies, etc and the violent interruption of the religious meetings of German Catholics and the removal of German Canons from office and their expulsion from the country As compared with these grave allegations some of which have been proved to be true on independent investigation by the League the Polish complaints from the German part of Upper Silesia are mostly trifling It is ridiculous that the League allowed its time to be taken up with the amusing case of a railway booking-office clerk who had requested a woman to ask for her ticket in German But it cannot be ignored that nearly 20 000 German children attend minority schools in Polish Upper Silesia while not even 1 000 children go to minority schools in the German province a fact which is not contested by the German authorities It may be mentioned further that in the Polish Parliament the number of representatives of national minorities is about one quarter of the total number of deputies In the elections of 1928 the

Conditions vary in Germany and Poland

* H. Lukaschek The Germans in Polish Upper Silesia p. 5

German minority were able to increase their representation in the legislature from 17 to 19 seats. On the other hand, not a single representative of a national minority sits in the German Reichstag. The two Polish deputies who had been in the Prussian Landtag failed to secure re-election in 1928. And both Germany and Poland follow the system of direct and secret proportional representation. These facts have been sought to be interpreted in different ways by Germany and Poland. The Germans use these in support of their contention that they represent really a minority in Poland while the Poles under Germany are satisfied with the existing arrangements. The Poles, on the contrary, use these as evidence of their liberal policy towards the Germans and of the German oppression of the Polish minority. Both these contentions cannot be true. The fact seems to be that the Poles under Germany have practically ceased to be Polish in their outlook on account of the Policy of Prussianization pursued for centuries and that the Germans under Poland still retain their allegiance to German culture and constitute a virile minority fully conscious of their pre-war position and their high state of intellectual and cultural efficiency. It means, in other words, that the Germans in Poland are giving the new State the trouble which is not possible in the case of the Poles under Germany. The German oppression is to be traced back to past history while the Polish oppression of the German minority appears to be an act of revenge. Neither Germany nor Poland can, therefore, wash their hands clean of the acute and frequent conflicts that have occurred.

What is the remedy? Treaty revision or more effective control by the League in respect of Minorities guarantees?

Wherein then does the remedy lie? Does it lie, as Germany contends,* in the revision of the Versailles Treaty? Or does it lie in a greater and more systematic control by the League over the difficult and complex position in the territories affected? The revision of the Versailles Treaty desirable as it is in many respects is, in our considered judgment,

* For an extreme German view read Axel Schmidt's "The Preposterous Corridor" (English Edition, 1933). "No passage of years," says the author, "can ever outlaw Germany's claim to the Polish corridor, the Netze district, Danzig and Polish Upper Silesia," p. 37.

out of the question for the present, for such a step would involve the reopening of all the issues which were considered and decided upon by the Peace Conference of 1919 * While we recognise that Germany has legitimate cause for grievance against the Treaty from political as well as economic points of view, we are of opinion that the question of any drastic revision of the Treaty would give rise to a much more complex situation in Europe than it is at present The only alternative therefore appears to be closer supervision and control by the League and its constituent bodies over the position of the minorities in the disturbed zones We think that the Peace Conference committed a blunder in excluding Germany and certain other States from the purview of the League of Nations That blunder should be rectified † It is a constant complaint by Poland that while she is bound by a Minorities Treaty no such obligation has been imposed upon Germany (barring the German part of Upper Silesia) with the result that the latter can violate with impunity the principles of minorities protection which have been evolved at Geneva and which constitute an integral part of the system of public law in Europe It is also a grievance with Poland that while her obligations in respect of minorities protection in her part of Upper Silesia are of a permanent character Germany's obligations in that respect in the German part of the Plebiscite territory are for a transitional period of 15 years only This is a grievance which ought to be carefully sympathetically and seriously considered by the League

The League has done well in establishing the principle that in matters of dispute the State complained against should not be

* An agreement known as the German Polish Non aggression Pact was signed on Friday the 26th of January 1934 which seems to have been hailed with deep satisfaction in the capitals of Europe. It provides for a peaceful settlement of all German-Polish problems. We have however our serious doubts if having regard to the nature of the issues particularly those bearing on territorial rearrangements after the Great War and the problem of minorities the terms of the agreement will be scrupulously observed We refuse to believe that a mere piece of paper is sufficient to heal ancient wounds aggravated as they have been by post war reconstruction.

† Germany has withdrawn from the League.

permitted to execute its measures and thus create a situation under which it may confront the Council with certain accomplished facts. The principle, in other words, is that the State complained against must suspend all its measures in respect of which petitions have been submitted to the League of Nations. What is needed is that this principle should be put into effective operation so that minorities may have no cause for grievance. This is a responsibility which the League should face boldly and without hesitation.

Promises held out to Ruthenians not redeemed in full

The present position of Ruthenia, for which some specific provisions were made in the Czecho-Slovak Minorities Treaty, throws a lurid light on the nature and so-called effectiveness of the League's guarantee. So far those provisions have not been put into force. Elections have not been regularly held in Ruthenia. Autonomous self-government which was promised has not yet been granted, Ruthenia still remains within the general system of the Czech administration. It is true that a native of Ruthenia has been appointed as Governor of the territory, but he is a mere figurehead, the real authority being exercised by the Vice-Governor who is a Czech and appointed by the Czecho-Slovak Government. It may be noted that the appointment of the Vice-Governor, curiously enough, had been made before the appointment of the Governor, and during the time when there was no Governor everything had to be entrusted to the Vice-Governor who "not only holds the substance of power, but is, in accordance with the letter of the law, in a far stronger position than the Governor."* In the Municipal elections which have been held in Ruthenia anti-Czech majorities have been returned to the local Councils which are no better than local public bodies as distinguished from the Central Diet. The Ruthenians have entered a strong and vehement protest against the delay in introducing self-government for themselves and "a vigorous anti-Czech agitation is being maintained."† The Czecho-Slovak Government state in reply that the Ruthenians are illiterate and as such are not capable of discharging

* A. Headlam Morley. The New Democratic Constitutions of Europe, p. 72.
† *Ibid*, p. 73.

the burden and responsibilities of government An additional argument has been sought in the poverty of the Ruthenians Those who pay the piper must have a right, it is argued to call for the tune and so long as the Czech tax payers supply the funds they are likely to resist the establishment of provincial autonomy for Ruthenia The Council of the League is however, watching the steps taken by Czecho-Slovakia to accord the Ruthenians the fullest measure of autonomy in accordance with her obligations The Secretary General was directed by a resolution of the 29th of November 1930 to keep the Council informed of the real state of things He is still performing the duty full autonomy not yet having been conceded *

Slovakia asks for autonomy her demand rejected but the Slovaks represented on the Government.

A delicate situation has also arisen in Slovakia owing chiefly to the introduction of Czech officials and school masters there and the anti religious tendency of the Government at Prague Slovakia is demanding a form of autonomous self government similar to that provided for Ruthenia in the Czecho-Slovak constitution as well as in the Minorities Treaty The demand has not yet been conceded The objections raised in the case of Ruthenia apply in this case also It is stated on behalf of the Central *Government that the Czech officials* were appointed originally owing to the lack of efficient and competent Slovaks to administer their own affairs and further the Slovaks unlike the Ruthenians have not the advantage of special recognition by a Minority Treaty or by the Constitution † It is well known that for the first few years the Slovak Peoples Party were in violent opposition to the Central Government It is however, probable observes Headlam Morley that the recent entrance of the German agrarians and of the Slovak Peoples Party into M Svehla s Coalition Government would be followed by the introduction of a new system of local Government throughout the whole State ‡

* See C 21 m. 12 1931 I.
† A. Headlam Morley The New Democratic Constitutions of Europe p. 73.
‡ *Ibid* pp. 73-74.

Has the League been successful?

The questions that now arise are Has the League succeeded in discharging satisfactorily its obligations to the minorities? Has the procedure of supervision and control adopted by it proved adequate and effective? A number of cases have been cited to show in what respects the League can legitimately claim to have brought about reconciliation between the Governments concerned and their respective minorities and in what respects it has failed to act decisively in the interests of minorities The important point to be noted in this connection is that the issues brought to the notice of the League are so numerous and cover such a wide range of subjects that it is difficult for an international body to intervene with success without giving rise to suspicion among the Governments affected It may be stated here that in their Report to the Assembly the Sixth Committee* mentioned that the representative of South Africa had emphasised that in certain areas of mixed population, where conflicts were frequent and serious, order had been maintained and peace restored by mere presence of consuls or other plenipotentiaries of foreign Governments who could take an impartial and detached view of events and bring their influence to bear on the conduct of the authorities in the disturbed zones He had further observed that cases might arise in which the presence of resident representatives of the League might have a more beneficent and immediate effect, and accordingly suggested that the Council might well consider in suitable cases the desirability of employing such representatives with the consent of the Governments concerned, to allay public excitement and to reassure the minorities

It intervenes in specific cases no constant supervision

The suggestions made by the South African representative are not embodied in a definite resolution, but the Committee admitted their force and placed them on record Nor, as we have seen,† was constant supervision by the League with regard to the position of

* The League of Nations and Minorities (issued by the Information Section of League of Nations Secretariat), p 28

† *Vide* pp 90 91

minorities considered valid by a Committee of the members of the Council Any such supervision was out of the question also because it was liable to be interpreted as an attempt by the League to interfere with the domestic concerns of the autonomous States The League has therefore evolved a procedure by which it intervenes only where specific cases of infraction or danger of infraction of the clauses in the Treaties are brought to the notice of the Council by a member thereof Petitions from unauthorised sources or petitions which do not satisfy certain conditions are not considered Most of the petitions however which come to the Council deal with imaginary grievances as is clear from the observations made by the Minorities Committees appointed in 1932 * In such cases the Committees make investigation and communicate their opinions to the Secretary General of the League No further action by the Council is required The results of investigation by the Committee are with the consent of the Government or Governments concerned published in the official journal of the League

It is not without interest to discuss here in some detail the question of frontier revisions as a means of solving the minorities problem In fact it has for some time past engaged the attention of political thinkers and careful students of the subject On moral grounds there can be no objection to a re-examination of frontiers in the light of new developments particularly when it is remembered that the frontier revisions were undertaken at the Peace settlement of 1919 with a view to giving certain peoples their national independence in accordance with the principles enunciated by President Wilson One will agree with Mr Macartney when he says that the frontiers laid down in 1919 and 1920 are no more sacrosanct than those which they replaced † If therefore it is found on proper and careful investigation that in certain respects and in specified areas the terms of the settlement have in practice departed from the principles

The revision of frontiers as a means of solving the problem and its limitations.

* O.J January February April and June, 1939.
† National States and National Minorities p 437

of justice and self-determination, there is no alternative to modifying them along lines which circumstances might warrant and justify. From the legal standpoint also there appears to be little doubt as to the validity of any action that might be taken in this behalf despite the guarantee of territorial integrity and security against external aggression contained in Article X of the League Covenant. For Article XIX gives the Assembly power to advise from time to time reconsideration by members of the League of those Treaties which have become inapplicable and examination of international conditions whose continuance might endanger the peace of the world. But what is legally valid may not be expedient. As we have suggested in the case of the Versailles Treaty, it is for us to enquire whether an attempt to revise the frontiers would or would not make the situation worse than it is at present. The Allies contend in reply to Germany that "every territorial settlement of the Treaty of Peace has been determined upon after the most careful and laboured consideration of all the religious, racial and linguistic factors in each particular country." That claim may not be justified in every detail, and there are cases in which justice has not been done to the aggrieved party out of disguised contempt for the vanquished. But their number is fortunately not very large. Frontier revisions have their limitations and they cannot by themselves solve the problem of minorities once and for all under the modern organisation of States and the present distribution of populations. In the majority of cases the remedy in the shape of frontier revisions is likely to prove worse than the disease itself especially at the present moment, for it will give rise to a formidable series of baffling national and international problems. But it must at the same time be clearly understood that existing frontiers are not absolutely sacrosanct. That must be emphasised not only as a moral principle but as a positive statement of law.

Peace depends more on the parties than on the League

Now although the League has a good record to its credit, it cannot be said that the oppression of the minorities in all the disturbed areas is now a thing of the past. The League, for example, has not been able to do anything substantial in Poland, Upper Silesia, Ruthenia and many other

places and give satisfaction to the minorities The results are not to be ascribed simply to the procedure of control and supervision The procedure seems to be effective for the specific purpose for which it was intended The whole thing depends more upon the cultivation of a spirit of co-operation and comradeship between a State and its people and between the majority and the minorities than upon any action by the League The obvious *difficulty in this regard arises from a spirit of defiance on* the part of the minorities who had formerly held the reins of power and from a spirit of vengeance on the part of the majority who had formerly been oppressed and have now come to possess power under the reorganisation of States in post-war Europe Both these tendencies are anti social and inimical to the growth and development of a common nationality and a common political consciousness The League whatever might be its procedure and however drastic its powers, cannot and will not succeed unless these tendencies are eliminated by steady and earnest efforts at reconciliation by the parties concerned The initiative ought to be taken by the Governments—men who occupy seats of authority They must show to the minorities in a convincing manner that justice is to be dealt out equally to all classes of the people irrespective of their race, language or religion and that nobody is to be denied the right to which he is entitled They must proceed further and give the minorities an opportunity to co-operate with them in the actual work of administration Minorities, on the other hand, must *respond generously They must not nurse any imaginary grievances* They must remember that if they have rights they have also obligations And the first and foremost duty on their part is to co-operate with their Government and to act as loyal and law abiding citizens So long as this sense of mutual trust and co-operation is lacking so long no international instrument and no international authority despite its prestige and disinterestedness will succeed in establishing peace and maintaining law in the disturbed zones

CHAPTER VII

Principles Underlying the Treaties.

The history of the problem traced back from the Congress of Vienna in 1814 down to the Treaty of Versailles, 1919, must have proved that Europe has been following during these hundred years a policy of gradual and progressive development in the matter of protection of minorities in the newly created States by international conventions or agreements. The origin of the protection of religious minorities, as has already been pointed out, is to be found in international documents far older than the Treaty of Versailles. M. D. Mello-Franco is of opinion that the first Treaty which stipulated expressly that in any country a class of citizens should not be treated, in law and in fact, as being inferior to other classes not only for religious but also for racial reasons, was the Treaty of Paris of 1856, concluded after the Crimean War. From that date onwards the question of protection of racial, linguistic and religious minorities has received ever-increasing attention from Governments of various countries. The question, however, has been raised on certain very important historic occasions resulting in important political changes such as (I) the incorporation of the territory of one State with that of another, (II) territorial rearrangements brought about by a war or a succession of wars, (III) the construction of new States generally and (IV) the construction of new States resulting from struggles on the part of certain States against the oppression of others. Examples of such changes, as Rapporteur M. De Mello-Franco observed at the fifth meeting of the Council of the League held at Geneva on the 9th December, 1925, were furnished by the Treaty of Berlin of 1878, which imposed religious toleration for their respective minorities on the newly created States and on autonomous principalities such as Bulgaria, Serbia and Roumania as a condition precedent to international recognition

contemplate preferential treatment for citizens as against non national inhabitants of the States concerned so far as the enjoyment of civil rights is concerned

Apart from the general principles of nationality laid down in the Minorities Treaties, the States have incorporated those principles in comprehensive laws and regulations promulgated by their legislatures Besides some of the States have entered into bipartite and multipartite treaties with regard to nationality * The law of nationality is very important because even at the present time certain rights in almost all States are reserved exclusively for citizens These rights may be called political or organic rights such as the right to vote in State or Municipal elections the right of eligibility for membership in national or local assemblies the capacity to become a juryman or a State official and the right and duty of being a soldier Often the acquisition of citizenship is essential even for certain occupations which though not State services are to a certain extent connected with the State organisation *e g* the profession of a public teacher a notary an Attorney at-law a priest etc Although so far as civil rights are concerned the position of aliens has been assimilated to that of nationals the Great War showed that the property of aliens was not absolutely protected by law unless it was protected by International Treaties In many States certain trades and professions are open to citizens only although no such discrimination is supported and upheld in the Treaties themselves †

Certain rights not open to aliens.

A few words are necessary with regard to cases of double or even manifold nationality ‡ Usually old citizenship expires with the acquisition of new citizenship In certain countries the

Cases of double or manifold nationality how a person becomes "stateless."

* Flournoy and Hudson Nationality Laws pp 645-709

† Aliens in India owe temporary allegiance to the Crown and are entitled to the protection of Indian laws (*Cf* Johnstone v Pedlar 1921 2 A.C 262 De Jager v Attorney General for Natal, 1907 A.C 326) Ordinarily they are triable in the same manner as natural born subjects. They are subjected to disabilities in respect of membership of local authorities but contrary to the English common law provision they seem to be entitled to own real property (*Cf* Mayor of Lyons v East India Company 1836 I Moo. Ind. App. 175)

‡ An interesting chapter on this question is given in Miss Mair s The Protection of Minorities, pp. 220-29

citizenship of those persons who declare for citizenship in another State, is cancelled automatically, but there are countries in which it is not considered as cancelled unless the proper authority declares it so formally. The laws of many countries regarding nationality are not identical and as they do not uniformly provide that an old citizenship must expire with the acquisition of a new one there arise cases of double or manifold nationality of the same individual * A person, for example, born in a State governed by the *jus soli* principle, of parents being citizens of a State under *jus sanguinis*, may be justly claimed as a national of both the States There are also cases in which through the conflict of laws a person becomes "stateless," *i e*, has no citizenship at all (*e g*, the divorced wife of a foreign husband) On account of such cases, efforts are being made, with the help of experts in international law, to provide that every person may have one citizenship only These efforts are intended to produce these two results, *viz*, (I) that no one may be without citizenship and (II) that no one may have more than one citizenship The difficulties involved, however, are great But they ought to be faced, and the solution thereof depends on international co-operation †

Mr C A Macartney is of opinion that "the nationality provisions of the Peace Treaties are not under the League guarantee, nor, indeed are the provisions of the Minority Treaties, except in so far as they relate to minorities "‡ We admit that this is a view which is shared by many other authorities including Temperley, but we cannot accept the thesis that nationality provisions even when they affect the minorities do not come under the League guarantee, on the grounds set out in connection with the case affecting the Ukranians in Lithuania on which the decision taken by the League is clear and decisive Nor can we appreciate Mr

* Document C, 265, 1928, I

† "The seven Successon States signed a Convention in Rome, in April, 1922, which had among its objects that of solving disputes as to nationality Only Italy and Austria have however ratified this A later Convention on the question of pensions has been ratified by all the States concerned except Roumania The international societies, particularly the Federation of the League of Nations Societies, have made tireless efforts to get this miserable scandal remedied but the Governments concerned refuse to move"

‡ *Cf* C A Macartney National States and National Minorities, App. II, p 500

Macartney's theory that the Minorities Treaties are not in certain respects applicable to the minorities

Provisions for Fundamental Rights.

3 A charter of fundamental rights is provided for, each State guaranteeing to all inhabitants irrespective of their religion race or language equality of treatment in law * All nationals are assured not only equality of civil and political rights but also of economic rights

Special rights for minorities.

4 In addition to a rather elaborate enunciation of the principles of Fundamental rights and liberties of the people the minorities defined in the Treaties are permitted by clear and specific provisions, to establish manage and control at their own expense religious social educational and charitable institutions, and to use their language and exercise their rites as the case may be freely in those institutions

5 In educational institutions maintained at public expense in towns districts and areas where a considerable proportion of the population belongs to the minority, the children of the minority are to be taught through the medium of their mother tongue The Government however reserve to themselves the right of making by law or regulation the teaching of the official language *obligatory in those schools Preferential treatment is thus accorded* to the language of the majority

6 In towns areas and districts where a considerable proportion of the people belongs to the minority that section of the people is to be given an equitable share of the public funds pro-

* In many *Succession States fundamental rights* guaranteed under the constitution have been practically suspended in recent years They do not allow that measure of free expression of opinion which older democratic States regarded as the essence of democracy In Danzig the Government have adopted measures extending the period of preventive detention from three weeks to three months and providing that the police orders of a political nature shall be immune from judicial control. They also empower the authorities to dissolve organisations in their discretion. These suspensions of civil liberties which come into conflict with the guarantees in the Treaties raise the issue as to whether they are purely domestic matters or come under the purview of the League. It seems to us contrary to the view taken by Temperley in another connection that the League cannot afford to stand aside having regard to the Guarantee Treaties.

vided for educational, religious or charitable purposes in State, municipal and other local budgets

What is "a considerable proportion of the population?"

7 The expression "a considerable proportion of the population" is not defined in the Treaties themselves, but the convention seems to have been established by the decisions of the League taken from time to time that it varies from 25 to 20 per cent of the total population in a country Nowhere is a smaller proportion recognised for the purposes of the special minority clauses in the Treaties Dr Radhakumud Mukherjee seems to think that a minority, according to the League, must attain a certain minimum size to be politically recognisable * He is right, so far as the special provisions for minorities in regard to the use of their languages in primary schools and the allocation of public funds for religious, educational and charitable purposes, are concerned. But no such limitation applies in the case of the other rights with which the first seven or eight clauses of the Treaties deal It is necessary to mark this difference The insistence on a standardised numerical size in the matter of enjoyment of certain specific minority rights proceeds from the theory that a minority in order to claim such special treatment should congregate in certain definite areas so as to make such treatment administratively feasible and convenient For special treatment primary education is more leniently treated than secondary education and religion more generously than education It is therefore wrong to conclude, as Dr Mukherjee appears to have done, that a minority, which does not attain the size contemplated in the convention already referred to, is not entitled to any protection whatsoever guaranteed under the Treaties The misconception that has arisen is due to the confusion of guarantees of ordinary civil rights with special protection

Is a scheme of de-nationalisation of States an effective solution?

8 The doctrine of assimilation or elimination of minorities based on race, language or religion has been abandoned in favour of a scheme of association, co-operation and partnership, thus

* Dr Radhakumud Mukherjee A Paper on the Problem of Minorities read before a meeting of the U P Legislative Council Nationalist Party

indicating a new and healthy phase in the development of inter-racial, inter-religious and inter-linguistic fusion in the Guarantee States. Experience has shown that it is a futile task to seek to solve the minorities problem by attempting to get rid of the minorities within a State altogether. Minorities, especially in Central Europe, where they are legitimately proud of their great traditions, will not without a fight submit to a scheme of complete extermination. Nor is there much hope in the theory of frontier revisions. That theory has its limitations as has been pointed out in a previous chapter. As the world is organised to-day majorities have to live side by side with minorities within Municipal limits. The business of the statesman is to recognise that fact and then to see how, without attempting the impossible at the present stage of our political and social development, something may be done to put an end to the moral degradation to which minorities in certain places are subjected solely on the pretext of the majority rule.

No equality in a national State.

Mr. Macartney * thinks that the real and effective solution of the problem lies in a new orientation of the aims and purposes of the State and an earnest effort to reconstruct it in the light of those aims and purposes. The State, in other words, must be un-national. The equality, it is contended, is incompatible with the doctrine of a national State. A national State is completely identified with the majority and emphasises that the heritage of the nation is the exclusive property of the majority and thus tends to rob the minority or minorities of their legitimate role in the formulation of policy and of their pride of culture, of traditions and of their moral and spiritual worth. What, therefore, is aimed at by those who are opposed to national States is to dissociate the conceptions of nation from those of State and to give the minority their cultural autonomy to the fullest extent consistently with the preservation of the State sovereignty. It is urged further that except in cases where freedom is patently abused there should be opportunities for free intercourse between a minority and what may be called their mother nationality—a thesis which carried to its logical conclusion

* C. A. Macartney, National States and National Minorities, pp. 450-79.

might encourage subversive activities on the plea of national self-determination It is to be noted that Mr Macartney is prepared to concede that in such circumstances the State concerned is entitled to refuse and punish such license. We admit that certain big and powerful States are trying to cease to be purely "national," and to the extent they have done so, they have succeeded in removing causes of inter-racial friction and making minorities an integral part of the political community One such State seems to be the United Kingdom So far as Wales is concerned, the anti-Welsh legislation was effectively removed in 1877, and the use of English or Welsh in local administration is regulated by the sole consideration of local demand In primary schools Welsh is as a general rule the medium of instruction while it is forcing its way steadily into a more exalted sphere We are told that the local requirements also determine the use of Gaelic in Scotland. There is no restriction on its use in private intercourse, religion and commerce Yet there is a general belief in Scotland that being the better channel of expression English should not be abandoned The fact, however, can neither be denied nor ignored that there is demand for Home Rule in Wales and Scotland, a demand which Westminster sanctified by habitual and inherited conservatism and fortified by the rule of the majority, is not likely to concede so easily This brings out the obvious limitations of the theory of "un-national" State It is difficult to secure complete divorce of politics and law from language, religion and culture It is dangerous to issue a blank cheque in favour of a strong, virile and powerful minority, to do so in the case of a weak and uncultured minority would amount to thoughtless abdication of the ever-expanding social functions of the State In large parts of Europe and elsewhere the problem is more or less psychological Grievances may be nursed, although there are no real grievances Claims may be advanced which have no foundation in theory or in fact What, therefore, is urgent is that the majority who control the political machinery must try to evolve a policy of non-interference in cultural and religious matters except only in emergencies and when considerations of law, order and peace are overriding, and make the minorities feel that they have a right to be

respectfully heard in legislation and administration An attempt to assimilate completely will prove provocative an attempt to replace the national State is likely to end in failure at this stage The League of Nations has in some instances repudiated the national sovereignty of States but it is only a process in the denationalisation of States The best arrangement in the circumstances appears to be one in which the State sovereignty is sought to be reconciled to group or community rights

Provisions for local autonomy as a scheme of protection.

9 Apart from fundamental rights and specific provisions for special rights and privileges in regard to education, language etc , the Minorities Treaties, declarations and conventions have sought to set up local autonomous units for the purposes of local and racial development The Ruthene territory in Czecho-Slovakia the Free Port of Memel the Free City of Danzig and Upper Silesia, are instances in point * Attempts have at the same time been made to frustrate the growth and development of State within State

The nature and extent of the League's jurisdiction in the matter of protection of minorities

10 Certain clauses of the Treaties relating to the fundamental rights in so far as they affect the majority have been placed by necessary intendment if not expressly outside the purview of the League while provisions relating to the specific rights and privileges for minorities as well as their fundamental rights stated in the Treaty are subject to the jurisdiction and control of the League the Council and the Court of International Justice A word of caution is called for in this connection It has been urged by a section of Hindu opinion in India that the League should take up the question of minorities protection that has been raised in the country and indeed a petition was addressed in that behalf to Geneva by the Hindu Mahasabha Dr Radhakumud Mukherjee of the Lucknow University who seems to have studied the League principles and procedure with some care and who is a zealous advocate of the Hindu cause is one of the sponsors of this

* The separation of Sind from Bombay and the creation of Orissa as a separate Federal unit with Provincial autonomy under the Government of India Act 1935 may be treated as an analogous move.

move Two points arise First, the League is not competent, in our considered judgment, to deal with minorities problems of a country or nation or State which is not bound by any Guarantee Treaty or declaration or convention It is no argument that India is an original member of the League and a signatory to the Treaties along with the United Kingdom Italy is also a signatory Is it seriously suggested that any section of Italian nationals can force the League by means of a petition to sit in judgment on Mussolini's conduct of policy and effectively redress the grievances from which any minority may happen to suffer within the Municipal limits of the "democracy" of the Duce? Such a suggestion would be dismissed in Italy as being ridiculous The same principle would apply in the case of India despite the fact that at Geneva India listens while Italy sometimes dictates

Whether the Indian problem comes within the purview of the League

Suppose, however, that the entire Indian community including Hindus, Mahomedans, Christians, Sikhs, Buddhists, Europeans and Anglo-Indians, with the concurrence of the Legislature and the Government of India, appear before the League and make a declaration accepting the main clauses of minorities protection, can the League then take cognisanse, in the juristic sense, of that declaration and take power under it to solve the Indian problem of minorities? The answer is that it cannot, for as at present constituted the Government of India is a subordinate branch of the British Administration and as such has no right to deal direct with Geneva in this matter We have our serious doubts if India's position would improve under the new constitution so far as League intervention in the minorities problem is concerned Legally and from the point of view of international practice, the United Kingdom has got to be a party to any such declaration before it can be recognised and enforced There is no reason to hope that the King-in-Council would agree to such a procedure within a measurable distance of time The Indian problem of minorities protection is still an issue which constitutionally comes within the jurisdiction of the Municipal Law of the Empire *

* An attempt was made in 1922 in the course of the League discussion of the rights of minorities by the Indian representative to impress on the South African

Whether Hindus in India constitute a minority under the 1935 Act the issue vague and in a chaotic condition

Secondly, even if the League were entitled to deal with it, it could not take cognisance of a petition addressed by the Hindus who constitute the majority of the Indian population, for it is contemplated that the League's jurisdiction applies only and exclusively to minorities. The Treaties are called the Minorities Guarantee Treaties and the heading as well as the specific provisions leave no room for doubt as regards this point. It is true that in certain old provinces such as Bengal, the Punjab and the North West Frontier Province and in the newly created province of Sind the Hindus are in a minority, but the League would be faced with the question as to whether a community constitutes a majority or a minority with reference to the country as a whole or with reference to any particular province or area of the country. From the standpoint of the country as a whole the Hindus cannot according to the League law and custom be treated as a minority. In the Draft Instruments of Instructions to the Governor General and the Governor* one gets some idea of the nature and character of minorities contemplated in the India Act of 1935. What is clear there is that minorities entitled to protection are not political or Parliamentary minorities. No indication however is given either in the Instruments or the Act itself of their numerical size nor is it quite clear whether they are to be treated for the purposes of protection with reference to India or to its constituent units. At the successive sessions of the Round Table Conference the discussion of the subject proceeded on the assumption that the Hindus are a majority in India irrespective of their position in the particular provinces. It

delegation the obligation of their Government to give the Indian minority in the Union effective protection. An assurance was held out on behalf of the Union that it would act in conformity with the spirit of the discussion making it clear *inter alia* that the League principles of protection were not legally binding on it. At the Imperial Conference of 1923 Sir T B Sapru protested against the attitude taken by General Smuts and intimated that it would perhaps be necessary to raise the Indian question in South Africa as an international issue and seek the protection of the League. The issue is somewhat different from the relations *inter se* of Indians in their own country

* Cmd 4805

seems, however, having regard to the federal basis of the new constitution that reference to the provinces is also implied It is curious that in the 1935 Act the Hindus as a community receive no recognition They are included in the "General" category which comprises all communities save Mahomedans, Europeans, Anglo-Indians, Indian Christians and Sikhs * In certain provinces some of the latter communities have no reserved seats which means that they come under the "General" constituency It will be difficult under the present arrangement to secure application of minorities safeguards to the Hindu community, even in provinces where they are in a minority, barring their reserved representation in the legislatures, for the question will be raised as to whether the Act at all gives the Hindus the status of a minority where in fact they constitute a minority of the population There is hardly any doubt that the Federal Court or the High Courts concerned will be confronted with difficult and complicated issues involving the meaning of "minority" as contemplated in the new constitution, a possibility which will give cause for grave anxiety The law has left the issue vague and in a chaotic condition In the rules made under the Government of India Act, 1919 (ss 63B and 72A) the Hindus are designated as "Non-Muhammadan"† as if Europeans and Anglo-Indians for whom representation in the legislature was reserved were not non-Muhammadans But then the 1919 Act contained no elaborate safeguards for minorities rights such as those incorporated in the 1935 Act and the problem of adjustment was easier then than it is now under the new constitution

Attention has been invited to the League resolution of the Sixth Assembly in which the hope has been expressed that the States-members of the League would be well advised in applying the principles incorporated in the Treaties in dealing with their respective minorities The resolution is not mandatory but only facultative and has no binding force It is a moral appeal and in no sense a legal formula All that can be reasonably urged,

* *Cf* The Fifth Schedule and the Table of Seats
† *Cf* Schedule I

therefore, is that His Majesty's Government in the United Kingdom should, in deciding the Indian issue, have taken into consideration the League principles excluding, if necessary, the detailed League procedure, a thesis which has been repudiated in Mr Macdonald's Award It may further be pointed out that once the United Kingdom has signed the Treaties and approved of the principles therein laid down it is up to it at least on moral grounds to make a declaration before the League and place the Indian problem at its disposal especially when its communal decision has been attacked and disowned by large sections of Indian opinion and is viewed with great suspicion The *communal problem in India is not one which can be settled by a* coercive method it ought to be solved by conciliation and co-operation

11 The principles of protection and methods of their enforcement have been removed from the sphere of intrigues of individual States or a concert of individual States inspired and guided by territorial ambitions and have been brought within the competence of a judicial body This marks a very healthy change in the public law of Europe and in this respect the League settlements expressing themselves as they do in the Minorities Treaties constitute a distinct advance on the earlier agreements or contracts dating back from the Congress of Vienna in 1814

The League acts more as a judicial body than as a concert of States.

12 The principle of separate electorates and of statutory representation of minorities in the legislatures other public bodies Cabinets and the permanent services has not been accepted in the Minorities Treaties * Nowhere in the constitutions of the countries which are bound by the Minorities Treaties have separate electorates or communal representation in the legislatures through separate electorates or in the Public Services been recognised as a method of minorities protection But steps

The Treaties recognise no communal electorates as a method of protection.

* The Communal franchise referred to in connection with the Aaland Islands is not communal franchise as popularly understood in India. It refers to the territorial Commune and not to any religious, racial or linguistic community (*supra* p 68)

have been taken in certain States, such as Czecho-Slovakia, to give an opportunity to minorities to have themselves represented not only in the legislatures but also in the Cabinet and in the permanent services That, however, is not strictly a matter of law as such, nor has it been provided for in the Treaties, but decrees have been promulgated for the purpose in certain States and in others conventions have been evolved to meet special requirements and to stabilise the administration It will be seen that in the Petition of Rights which the First Congress of the National Minorities adopted is included a demand for the introduction of electoral systems which should ensure the representation of minorities in legislatures in proportion to their numbers This may be secured generally by proportional representation or by the system of separate electorates with reservation of seats The post-War States have adopted the first method while in India the end in view has been sought to be secured by the adoption of the second method since 1909

The Treaties do not apply to Big Powers differential treatment under the League

13 The Minorities Treaties do not apply to all the States of the world or even to all the members of the League of Nations The Allied and Associated Powers are under no obligation to accept them It is only on the small or Succession States that the Treaties have been imposed This differential treatment has led to acute heart-burning and caused many troubles to the League and, to some extent, impaired its moral authority This principle is to be considered carefully in the light of the observations made in the Sixth Assembly of the League by representatives of the different nations as summarised in the Rapporteur's Report presented to the Council in 1926 At the Sixth Committee of the League Assembly in 1925, the Lithuanian delegate repeated the objections which the representatives of certain States had made at the Peace Conference of 1919, to the acceptance of obligations concerning the protection of minorities The latter had then declared their readiness to undertake such obligations provided all the States-members of the League of Nations pledged themselves to a like undertaking We have seen how President Wilson and later M Clemenceau refuted those objections. The Council Rapporteur not only shares the view ex-

pressed by the American peace maker and the French statesman but has sought to explain it at some length He thinks that the factors, namely, the incorporation of the territory of one State with that of another, territorial re arrangements resulting from a war, the constitution of new States or the creation of new States arising from struggles on the part of certain States against the oppression of other States are not to be found in connection with some of the States members of the League of Nations The minority or minorities in such States it is contended are not the product of struggles between certain nationalities or of the transference of certain territories from one sovereignty to another through successive historic stages The mere co existence of groups of persons forming collective entities, racially different in the territory and under the jurisdiction of a State we are further told is not sufficient to create an obligation to recog nise the existence in that State side by side with the majority of its population of a minority requiring protection under the League of Nations Apart from its distinguishing features in respect of race language and religion, a minority must possess a psychological social and historical attribute constituting its principal differential characteristic for the purposes of protection In this view of the case it was held that it would be impossible to ask all the States to adhere to and accept a general Treaty for the protection of minorities such as was proposed by the head of the Lithuanian delegation In support of that thesis the Council Rapporteur quoted with approval a statement made by Dutch Senator Baron Wittert Von Hoogland in the course of which he said

The introduction into the laws of all countries of provisions protecting minorities would be enough to cause them to spring up where they were least expected, to provoke unrest among them to cause them to pose as having been sacrificed and generally to create an artificial agitation of which no one had up to that moment dreamed It would be rather imaginary illnesses from which so many people think themselves suffering the moment they read a book on popular medicine The proposal therefore for a uniform law in all these States for the protection of their minorities was rejected

Territorial changes after the War benefit non-Treaty States

But the Rapporteur admitted that it was necessary on the part of all the States-members of the League to protect racial, religious or linguistic minorities against oppression or the consequences of prejudice and disguised ill-will to which they might be exposed The hope was expressed that if all the States were inspired loyally by the principles of the resolution adopted by the Assembly of the League on Professor Gilbert Murray's motion,* minorities would everywhere receive the same treatment of justice and toleration which was contemplated in the Minorities Treaties and which the Council sought to secure for them We are, however, of opinion that the arguments advanced by President Wilson and Clemenceau in 1919 and reiterated by the Council Rapporteur in 1925 are not convincing It is not correct to say that the War has brought about changes only in the Succession States on which international obligations of minorities protection have been imposed under the system inaugurated by the Treaties of Peace To give one example, by the Treaty of St Germain, Austria ceded to Italy the Southern part of the province of Tyrol as far as the Brenner Pass German South Tyrol, from Salurn to the present frontier, contains about 200,000 Germans The Treaty of Rapallo, under which Italy acquired from Yugo-Slavia the provinces of Gorizia-Gradisca, Trieste and Istria, created a considerable Slav minority In these regions the Slavs number 500,000 Slovenes in the north and Croats in Istria At the Peace Conference Austria entered a vehement protest against the cession of an almost purely German territory to Italy The protest was ineffective, although the cession could not at all be justified except on strategic grounds, but the Italian Government held out the assurance that it would "carry out a wide and liberal policy in respect of language, culture and economic interests." This undertaking has been honoured more in its breach than in its observance, particularly after the rise to power of Mussolini This will be clear from an interview which the Italian dictator gave to a Paris newspaper in 1926, in the course of which he said .

* The resolution passed in 1922 was re affirmed in October, 1933

> When I visited South Tyrol I noticed that everything there was German church school public functionaries railway and post-officials Everywhere nothing but the German language was heard and people sang songs such as in Rome would have caused their immediate arrest Now in all the schools of this province the teaching of the Italian language is obligatory all post and railway officials are Italians and we are just now about to settle there a large number of Italian families One thousand families of ex-combatants will be sent to South Tyrol with a view to promoting the amelioration of the soil In this way we shall succeed in Italianising the country

The Fascist policy of Italianisation violates the principles of protection.

The Fascist policy of Italianisation was formally inaugurated in 1923 when Signor Tolomei enunciated a comprehensive programme which has since been incorporated in simple legislation Accordingly the census was modified in favour of the Italian population The use of any other language but Italian in advertisements public notices legal proceedings and official correspondence was suppressed German place-names names of public thoroughfares and family names were completely Italianised German Banks were dissolved Chambers of Commerce and agricultural associations with German affiliations the German Alpine Union Catholic Students Unions and Choral Societies and Fire Brigades were suppressed An intensive programme of Italian colonisation was organised and enforced to the prejudice of Italian citizens of German origin and the strength of the troops stationed in the province was considerably augmented for the purpose of over awing and intimidating the Germans This is nothing short of a reign of terror The matter was raised at a meeting of the International Federation of the League of Nations Societies at Berlin in May 1927 And although the Fascist representative made a conciliatory speech and promised to use his influence against oppression the world has yet to be satisfied that the promise has been made good and that Mussolini s heavy roller for the oppression of minorities or of groups, not friendly to his dictatorship has ceased to function

The doctrine that inasmuch as Western Europe has established personal liberty either by the rule of law or statutory declara

tions of rights she does not require for the purposes of minorities protection international guarantees of the nature specified in the Peace Treaties can hardly be relied upon While it is true that there are constitutional guarantees in this regard in Western Europe, it is necessary to examine how far those guarantees are effective and how far they are not so Reference has already been made to the laws which have been promulgated by the Italian Dictator and which have for all practical purposes invaded most ruthlessly the fundamental rights of the people, particularly the transferred minorities in Italy The policy recently inaugurated by the Nazis under the leadership of Herr Hitler in Germany emphasises the fact that the constitutional safeguards may prove illusory in practice It seems the whole world is in a melting pot The illusion of security is being exposed Parliamentary democracy is being broken to pieces Dictatorship is slowly but steadily raising its head in all parts of the world Whatever might be the reasons for all these, the signs are clear Great Britain has just survived an attack on the hoary traditions of her political system There are difficulties in the United States of America and in the South American Republics Turkey and Persia have surrendered themselves to Dictatorship on the Western model In Japan the ruling authority is not the people but a military Oligarchy Spain has not yet discovered the conditions of stability and of security She is now in turmoil Nor is there, as Professor Laski points out,* comfort in other directions So long democracy was a pretence, now even that pretence is being abandoned in despair and disgust

The problem of minorities not confined to Central or Eastern Europe

Nor can the existence of linguistic, religious and racial minorities in many of those States be denied The problem of minorities is not confined to Central Europe It is becoming a world problem There is no sense in the theory that " minorities only exist where there is a Treaty "† The position in Italy has been described with particular reference to the newly

* H J Laski Democracy in Crisis, pp 39-49

† L of N Records of the Sixth Assembly Minutes of the Sixth Committee, 4th meeting (P R , pp 51-56)

acquired minorities in Tyrol and Istria whose case for protection is as strong as that of the minorities in Poland or in any Succession State The Germans assigned to Belgium under the Treaty of Versailles have a right to ask the Big Powers represented on the League to show cause why they should not be protected There are in addition, conflicts of language in educational institutions, in courts of justice and in administration in that country For generations the Belgian culture was predominantly French to-day Flemish which was originally a peasant dialect with no pretensions to literary purity or excellence is forcing its way with new ambitions and irresistible claims There has been a persistent attempt at assimilation—recall the principles laid down in the Belgian constitution of 1830—but it has failed * Jurymen are not satisfied at present merely with the right to say yes or no in French or Flemish to questions put to them There is an insistent demand for recognition of Flemish in administration in Courts of law in the Army and in higher education The Flemish national movement has assiduously worked and stubbornly fought It has succeeded but the success is not yet complete The complete equality of status has not yet been reached

From Belgium we go to Spain The Basques of Spain are an exceedingly stubborn and determined race Coercion has failed to lower their flag or damp their enthusiasm for national renaissance The problem is complicated by the Catalans who would not give up their cause without a fight Representing as they do a culturally advanced and economically prosperous community they look upon the Spaniards as a dead weight on their peace their progress and their prosperity Their history is the history in a nut shell of all oppressed national minorities They have at some period or other been subjected to a ruthless process of annihilation —the complete subordination of local needs and requirements to the overriding considerations of a centralised machinery the dethronement of their past traditions and the relegation of their language to the position of a peasant dialect There is now a reaction—a revolt against power and authority and the growth and development of a separate nationalist movement Forces

* T H. Reed: Politics of Belgium pp. 3-4

have been set in motion which it is both difficult and dangerous to repress. There is a gesture in the shape of a statute seeking to give them protection, but it is doubtful whether it will serve the purpose for which it is intended. What a section of the Catalans demand is not mere power but power with a vengeance. In France also the reaction against assimilation has begun. Can she completely ignore the case for some measure of administrative devolution in favour of the Bretons, the Corsicans and the Flemish? Is there nothing in the emergence of a Bretene autonomist party with a programme of government of the Bretons by the Bretons and for the Bretons?

Where again is the ground for hope of the continuance of an integrated State in the United Kingdom? There are important sections both in Wales and Scotland which are growing restless, and a time is likely to come when Westminster will have to meet the situation either by devolution or by some legislative scheme of federation or by a Treaty on the lines of the Anglo-Irish Treaty. And what of the British Empire itself? It includes Whitemen, Brownmen, Yellowmen and Blackmen. Look at its religious variety. There are Christians, Hindus, Mussalmans, Buddhists, Jews, Parsis and primitive and backward tribes superstitious to the core and suspicious of outside control and supervision. The King and the Queen are by an Act of Parliament Protestants whereas the Empire is both Protestant and Catholic. As Zimmern points out the Empire "includes compact Roman Catholic populations in Ireland, in Malta and French Canada, not to mention a large scattered Catholic population in Australia and elsewhere. It includes in Cyprus a community belonging to the Greek Orthodox Church, and in Canada communities belong to the Uniat Church."* Then the Germanic culture is strongly represented in Dutch South Africa, the Latin in French Canada and the Slav is steadily pushing its way to recognition in Western Canada. The problem of minorities in India is by itself a huge and formidable problem, a subject which has been reserved for detailed treatment in the third section of this work. Suffice it, however, to point out here that there is conflict between Indians and

* A. Zimmern, The Third British Empire, p. 7.

Britons There is also conflict between Hindus and Mussalmans, apart from the complications caused by the existence of minor castes sects and races The presence of the English it has been suggested, is at once a help and a hindrance in every possible scheme of protection, at once a beneficent gift of Providence and a cruel curse of Nature Mr Macartney not only admits these facts but elaborates the issues involved in somewhat great detail The problem of minorities is becoming a world issue and men, statesmen and supermen are all overawed by its size, its immensity and its complexity

The need for an international convention for minorities protection

What is the guarantee in these circumstances that the rights of linguistic, religious and racial minorities sought to be secured under the rule of law or statutory declarations would be scrupulously observed and effective enforced? In such a situation is it not better to appeal from the national States to a well-organised family of nations where the constituent members still retaining the internal sovereignty which is essential to their existence may solve problems relating to the protection of minorities by discussion persuasion and conciliation? The existing system under which a line of demarcation has been drawn between Western Europe and the Succession States seems to be untenable and it is necessary that all the States-members of the League of Nations should be bound by a general international Convention for the protection of minorities We are aware that there are States which have minorities within their jurisdiction and are bound by International Minorities Treaties and that there are States which have minorities but have no international obligations to protect their rights There may also be States which have neither minorities (we have serious doubts on this point) nor are bound by Minorities Treaties This difference does not affect the usefulness of a general Convention Those States which are not faced with urgent minorities problems are not obviously touched by it On the other hand a Convention instituted for the purpose may be pressed into requisition subject to the procedure evolved under the auspices of the League of Nations for safeguarding the rights of any minority or groups of minorities in any

part of the world It will give a sense of security to minorities so essential to the stability of nationally organised States

The inequality in status of the different members of the League is a drawback, both from political and moral standpoint It is more than a drawback, it is a danger As M Galvanauskas, representing Lithuania at the Sixth Assembly of the League of Nations, observed, the "moral unity among members of the League is impossible so long as the sovereignty of some of them is restricted by higher interests, whilst others are under no such restraints * This is one of the reasons why the League should make a general statement and have it incorporated in a Convention regarding the protection of minorities, imposing the same duties and responsibilities upon all the States-members of the League in respect of the racial, religious and linguistic minorities " All that was proposed was to generalise the system and the procedure evolved to enforce it The proposal advocated by the Lithuanian delegate emphasised the principles of liberty, equality and fraternity—those principles which inspired President Wilson in conceiving a Family of Nations for international peace and co-operation How then could the League ignore them? It is quite clear that that body was sensible of the desirability of adopting a policy of equal and uniform treatment towards its constituent members as would be seen from the Resolution which was adopted at the Assembly on September 21, 1922 It reads as follows

> 'The Assembly expresses the hope that the States which are not bound by any legal obligations to the League with respect to minorities will nevertheless observe in the treatment of their own racial, religious or linguistic minorities at least as high a standard of justice and toleration as is required by any of the Treaties and by regular action of the Council "

The problem cannot be solved by a pious wish

The adoption of that principle without attempting to create a sanction behind it seems to be meaningless particularly when its execution involves a certain measure of diminution of the sovereignty of the States concerned Neither the minorities in general nor those States-members of the League

* O J., February, 1926, p 295

which are bound by International Treaties are satisfied with a mere recommendation and that for good reasons They demand *vincula juries* from all the members of the League There are records to show that representatives of minorities especially those, who are not protected by International Treaties have, since the inauguration of the League of Nations harboured feelings of mistrust and suspicion Since 1925 they have met annually in Congress at Geneva for the purpose of exchanging views and formulation of demands The first Congress claimed for all minorities freedom of education opportunities of economic development and local autonomy The second developed these demands into the form of a detailed Petition of Rights * In 1923 the Twenty first Conference of the Inter Parliamentary Union which met at Copenhagen formulated a declaration of the rights and duties of minorities To that declaration a resolution was annexed which is important for our purpose The resolution was to the following effect

> In view of the desirability of bringing about the adoption as principles recognised by international law and by the constitutional law of States with a representative system of Government of fundamental rights and duties of minorities of race or religion
>
> The Twenty first Inter Parliamentary Conference asks the groups to lay before their respective Governments the accompanying declaration of the rights and duties of minorities
>
> And requests the Inter Parliamentary Bureau to transmit the said declaration to the League of Nations with a view to the drafting of a general Convention between the States on the basis of the principles set forth in the declaration

Nor is this idea confined to the Inter Parliamentary Union only In 1923 the Federation of the League of Nations Societies which has already been referred to invited the attention of the States members of the League to the resolution adopted in 1922 and called on them to realise its object either by accepting minorities Treaties or by effective internal legislation In 1925 it urged the necessity of laying down a general international statute

* Mair: The Protection of Minorities Chap. XIII.

of "the rights and duties of minorities" along lines of the Minorities Guarantee Treaties Three years later it emphasised that the existing principles of minorities protection should be inserted as the governing principles of the Covenant

A scheme of generalising the Treaty system

Is the demand for a generalisation of the present Treaty system unreasonable and extravagant? Is Lord Cecil justified in seeking to strike terror by speaking of the "obstreperous Welshman?" Where is the ground for the gloomy forebodings of M Hymans of Belgium? There is no attempt to deny that minorities in all parts of the world ought to have the opportunities of national development On the issue, however, as to whether they should all be placed under international control doubts have been expressed and fears and anxieties entertained One has heard the voice of Cleamanceau being echoed in the writings of experts We find, for example, Mr Macartney, who admits that the problem is one of world-wide significance, stating in all seriousness that the peculiar circumstances of *some* European States made the protection of their minorities "genuinely a matter of international concern, thus giving the League a *locus standi* for acting, in furtherance of its own main object, which is the maintenance of the peace of the world"* This is a thesis which the author himself seems to have demolished in the earlier part of his excellent work in which he has examined the position of minorities in Italy, France, Belgium and the United Kingdom Besides, the suggestion that the object of the Minorities Treaties is the maintenance of world peace and not the protection of minorities as such is rather much too sweeping

The Big Powers' legal immunity gives cause for anxiety

It is further difficult to concede, assuming that Mr Macartney is correct in stating the purpose of the Treaties, that international peace is the concern of Big Powers and not of small States and that peace depends on the latter's submission to dictation from outside and the former's absolute, moral and legal immunity from the jurisdiction of the League It has been argued by the same

* C A Macartney National States and National Minorities, pp 489-90

author that the effective results of the League's work to date have proved disappointing.* He goes further and says that they have been particularly disappointing in the cases of those minorities who had no friend at court (i.e., on the Council). If that be the achievement of the League during its fourteen or fifteen years' working, then the case is complete for abolition of the system altogether and not for the existing principle and policy of discrimination. At any rate, it calls for a thorough re-examination of the system. What, however, is clear is that minorities, except in Turkey where they are apparently working under the pressure of the State, are anxious not only to have the system retained but extended. The States bound by international guarantees are not so much opposed to the Treaties and the principles incorporated therein as to differential treatment as between one State-member of the League and another. Then it is suggested that generalisation would weaken the scheme of protection and reduce advantages which minorities under Treaty protection would enjoy inasmuch as the Big Powers, who are conscious of their responsibility for the special position of the transferred minorities, will not take their work seriously and earnestly when under generalisation they would constantly feel that they might have the tables turned upon them. There is not, it is contended, sufficient courage in the League and it will completely vanish into the thin air when all the members of the League will be brought under a general scheme of protection. Impudence is not courage and the world will gain if the Big Powers are made to realise that they have as much moral and legal obligations to an International Assembly and a World Court as the Succession States.

The scheme of generalisation connected with the problem of immigration.

The only apparently sensible argument adduced against generalisation is that it may give rise to difficulties involved in the question of immigration. Will immigrants, for instance, be entitled to international protection of the type and nature provided in the Treaties? We recognise that their position is different from that of autochthonous populations

* C. A. Macartney: National States and National Minorities, p. 421.

transferred to alien sovereignty by Treaty" It is suggested that one of the results of an attempt to extend the provisions of the Treaties to immigrants would be to dry up the stream of immigration and thus confront the world with a new and vastly complex problem, for every State which at present in theory and practice enjoys the absolute discretion to determine the composition of its people, would feel inclined to restrict foreign immigration unduly and add complications to the puzzles of an already distressed world The only alternative to such a situation, it is pointed out, would be to define sufficiently the scope of the Treaties and place the immigrants outside the purview of the League To that the answer is twofold In the first place, a generalisation of the Treaties does not necessarily touch the question of immigration In the second place, it is our conviction that if the League has to prove effective as an instrument of international peace it cannot afford to shirk the issues arising out of migrations of populations from one part of the world to another Of course, the present jurisdiction of the League is confined to certain minorities transferred to alien sovereignty by Treaty But there is no sense or logic in such artificial restriction of its functions In the interests of world peace and effective minorities protection the League system should be applied to all racial, linguistic and religious minorities of different States, no matter whether they are immigrants as Indians in the British Dominions and Colonies or constitute an integral part of the community such as the native races in South Africa, and Mahomedans, Anglo-Indians, etc, in India, or a transferred minority as the Germans in Poland It may detract from the sovereignty of the individual nation-States and involve a re-statement of the general theory of sovereignty There is no meaning in a catchword, sometimes it proves dangerous There is something greater than national sovereignty and it is the peace, progress and prosperity of mankind Has not the application of the Austinian theory of sovereignty produced horrible results in some cases? Have not State vanities led to manslaughter of the cruelest and most ruthless type?

In view of the persistent clamour on the part of the minorities for the protection of their just and legitimate rights in differ-

ent parts of the world and of the reluctance on the part of the States bound by the Treaties to enforce effectively the provisions contained therein unless the Big Powers in the League accept like obligations in respect of their minorities it is difficult to support the contention put forward at the Sixth Assembly of the League by M Hymans of Belgium that the proposal to create a general Convention is a dangerous one * We cannot see how the institution of a system of this nature can become a permanent cause of internal troubles and disputes and lead ultimately to international conflicts as apprehended by the Belgian delegate

Peace based on Justice is the ideal.

We have reasons to believe that it will safeguard internal security and international peace rather than produce internal deadlocks and international conflicts Justice and equality must be the basis of moral peace Voluntary co-operation rather than forced obedience can ensure it The ideal of the League should not be peace alone but peace based upon justice It is the duty of the League not only to assert the principles of justice but also to convince all its constituent members that justice is being done

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* O.J February 1926, p. 200.

Part II

CHAPTER VIII

SAFEGUARDS IN U S A , SWITZERLAND, GERMANY AND RUSSIA

Where minorities safe guards are excluded from the jurisdiction of the League

It has already been stated that the Minorities Treaties do not apply to a large number of States, many of which are members of the League of Nations That does not mean, however, that those States have no minorities within their borders and that the problem of protection of those minorities has never confronted them In none of those States has the problem of protection been treated exactly along lines similar to those which have been adopted in the Minorities Treaties But most of them have stated and adopted in their constitutions certain fundamental rights which secure to all citizens irrespective of their race, religion or language, general safeguards against oppression or tyranny by the majority communities Some of them again have made special provisions for the protection of linguistic and religious rights of minorities It must be remembered that all those safeguards form part of the Municipal laws of the countries concerned and have no international bearing

The position in four different countries

It is proposed in this chapter to discuss the provisions for minorities safeguards in four typical democracies* in the world, *viz* , the United States of America, the Swiss Confederation, the German Reich and the Russian Socialist Federal Soviet Republic The constitution of the United States was born of war Prior to the war of liberation, the States that later came to be known as the United States,

* " Democracy " is a much abused term Aristotle had understood it in a sense not exactly similar to that in which it came to be interpreted in the nineteenth century when national progress was largely measured in terms of mechanised industry and trade The emergence of the aggressive Socialist seems to have changed the outlook to some extent Doubt is now entertained about the American democracy in so far as it has failed to readjust claims as between different classes of the people Started after the war under the Weimar constitution avowedly as a Parliamentary democracy

thirteen in number, had been separate and autonomous British Colonies, each with its own distinct history and antecedents People belonging to different races and professing distinct types of the Christian faith came together and formed a common Union Besides, scattered all over the States are a large number of Indians and negroes much inferior to the European races in the scale of culture and civilisation The Swiss constitution is specially important in this connection because it deals with a population who speak four different languages and further because some of those peoples, namely, those who speak German, are Protestants while the rest are Roman Catholics The main reason why Germany and Russia deserve special treatment in these pages is that they are two of the most important post-war Republics—countries which had for centuries been governed by autocratic despots and in which the entire citizen body had been subjected to reckless and drastic laws, decrees and ordinances.

U S A

Nationality is the basis of rights.

The problem of minorities in the United States as elsewhere ought to be discussed with reference to the law of nationality obtaining there for that law is generally the basis of the rights of citizenship as we have seen in the case of those States which have accepted the Minorities Treaties The point becomes clear when it is remembered that in all States citizens and aliens are not treated on terms of perfect equality in all matters and that the latter whatever might be their religion, race or language, are as a general rule excluded from certain rights and privileges which are enjoyed by the former

The law of nationality in U.S.A. ; restrictions on non-white peoples.

The law of nationality of the United States * defined in the Act of 1790 was passed in accordance with Article 1 Section 8 of its Constitution framed a year before authorizing Congress

Germany has now reverted to dictatorship in fact if not strictly in law The Russian Soviet Republic began as the dictatorship of the proletariat. It remains so but certain constitutional changes recently introduced are likely to raise the individual in the Russian scale of civilisation and democracy The Swiss Confederation does not tend to react so quickly to new phases and instead clings to its old ideal.

* Nationality Laws by Flournoy and Hudson pp 678-76 585-95

to establish "an uniform law of naturalisation." The Act provided that the rights of citizenship should not extend to persons whose fathers had never been residents in the United States, that a "free white man" who had resided there for two years should be naturalised and that the children of the citizens of the United States who might have been born beyond sea or out of the limits of the United States should be treated as natural-born citizens. Two years' residence required by the Act was raised to five years in the first instance, and subsequently, to fourteen years by the Act of 1798 Again, the Fourteenth Amendment to the Constitution lays down that all persons born or naturalised in the United States and, subject to their jurisdiction, are "citizens of the United States and of the States wherein they reside" The amendment had thrown open both National and States citizenship to the freed Negroes, and in the Slaughter House cases* decided in 1873 the Supreme Court declared its "pervading purpose" to be the overruling of the Dred Scott case in so far as that decision had denied the Negroes the status of citizenship

The right of naturalisation.

The applicability of the provisions to other races was judicially tested when Chinese and other Asiatics were deprived of the right of naturalisation and then of entry into the United States In *United States v Wong Kim Ark* the issue raised was as to whether children of non-citizens, if "born in the United States," were entitled to the rights and privileges of citizenship from which their parents had been robbed The question was answered in the affirmative by the Supreme Court and Wong Kim Ark was granted the right of entry of which he had been illegally deprived It was held that besides children and members of the *Indian* tribes who stood in a peculiar relation to the National Government the phrase "and subject to the jurisdiction thereof" excluded two classes of people only, namely, children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State † These laws supplemented as they were by subsequent legislative

* 16 Wallace, 36 (1873)
† 169 United States, 649 (1898).

enactments on the subject practically give us a full measure of American citizenship Large and wide powers have been conferred upon the Court regarding the issue of papers or letters of citizenship to foreigners The general procedure is that an alien must appear in person before the Court accompanied by two witnesses, and answer questions put to him by the Naturalisation Officer or by the Presiding Judge He has to satisfy the court about his record his knowledge of American government, his views on social and political organisations and his readiness to perform the obligations of citizenship He is admitted to American citizenship should the Court certify that it was satisfied with his record his knowledge of the constitution etc Under the law of June 2 1924, all non-citizen *Indians* born within the territorial limits of the United States are admitted to the rights of citizenship of the United States The grant of such citizenship does not impair or, in any way, affect their title to tribal or other property * But a petitioner for naturalisation † has to satisfy the competent authorities that he is a white person or of African nationality or of African descent and not a polygamist nor a believer in the practice of polygamy and that he is able to speak the English language He has, further, for the purpose of being admitted to American citizenship to declare his renunciation absolutely and for ever, of fidelity to any foreign prince potentate state, or sovereignty, and his intention to reside permanently in the United States

Two points seemed to have emerged from the decision in the Slaughter House cases First, restrictions are imposed upon a large number of Indians and other oriental races such as the Chinese or the Japanese in the matter of acquisition of American citizenship Secondly, in order to acquire it one has to renounce one s previous nationality In the Wong Kim Ark case the Court, however, refused to accept the interpretation of the clause subject to its jurisdiction ' given in the earlier case of 1873 and observed that to hold that the Fourteenth Amendment of the constitution excludes from

* 43 Stat. 253.
† 34 Stat. 596 40 Stat. 542 and 44 Stat. 709

citizenship the children born in the United States of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States" It undoubtedly marks a substantial improvement on the old practice

The privilege of the writ of *habeas corpus* provision against the Bill of Attainder

After having defined the law of nationality and the various methods of its acquisition, the framers of the American constitution conferred under sec 9, clause 2, the privileges of the writ of *habeas corpus* on all citizens The writ had been greatly abused in England by means of special Acts temporarily suspending the privileges inherent in it * The American people, bitterly conscious as they were of the flagrant breaches of the privileges, proceeded to lay down that the writ must not be suspended except in the case of rebellion or foreign invasion The law, however, did not make it clear whether Congress or the President should exercise this suspending power in exceptional circumstances The issue has been settled beyond doubt by a ruling of the Supreme Court according to which Congress alone possesses such right The same section provides that no bill of attainder† shall be passed It may again be recalled that this method had been frequently resorted to in England for the purpose of condemning a person who could not be convicted by a jury and in accordance with due process of law Earl of Strafford, one of Charles I's advisers, was executed under the provisions of the Bill.

No religious test required for admission to Federal appointments

Under Art. VI, Sec 3, the Senators and representatives, members of the States Legislatures and all executive and judicial officers, both of the Federal Government and of the constituent States, are bound by oath or affirmation to support the constitu-

* Munro The Constitution of the United States, p 58

† A bill of attainder is a legislative measure which inflicts penalty without judicial trial Such legislation was invented in England and the first measure of the kind was passed by Parliament in 1459 It was frequently resorted to under Tudors and Stuarts because it afforded an easy way to get rid of "undesirables."

tion So far as appointments to any office or public trust under the Government of the United States are concerned, no religious test is required or insisted upon as a qualification for admission It is clear that this particular provision against religious test applies only to the Federal Government and not to the States, although the oath to support the constitution is binding upon public servants under both the administrations It is difficult to understand why the law forbidding the provision of a religious test was not made uniform in the case of all Federal and State officials It may be borne in mind that in 1787 some States had insisted upon their officers taking a particular form of oath which was identical for all practical purposes, with a religious test That practice was not disturbed by the framers of the constitution We are told that in practice almost all States have long since abolished this pernicious discrimination on grounds of religion in the matter of public employments *

Safeguards against religious inequality

Students of American constitutional law must have noticed an outstanding defect in the original constitution in that there was deliberate omission of safeguards for religious freedom and religious equality Jefferson felt it very keenly and was reconciled when Madison and others assured him that the defect would be removed by amendments of the constitution The first amendment put into operation in 1791 imposed restrictions upon Congress and not upon the States in respect of the Government establishments of religious bodies † According to that amendment Congress is not entitled to make any law in this regard but there is nothing preventing the States from doing so and there are certain States which aid and encourage sectarian schools by liberal grants out of the public exchequer The same article provides that Congress shall not promulgate any law prohibiting the free exercise of religion thereby securing to all American citizens legal and constitutional immunities from interference by the Government in respect of their religious rites and observances Nor has the Federal legislature

* Munro The Constitution of the United States pp. 128-29
† Ibid, pp. 135-36

power to make laws abridging or curtailing the freedom of speech or of the Press and the right of the people "peaceably"* to meet and assemble and call upon the Government to redress their grievances.

A charter of fundamental rights for the citizens

The next eight articles of the amendment † deal with what may be called the charter of fundamental rights of the people The charter secures to them the right to keep and bear arms and guarantees inviolability of their dwelling houses and gives them protection "against unreasonable searches and seizures of their persons, papers and effects" It gives them protection of life and property which cannot be taken away without "due process of law" It gives the accused persons in all criminal prosecutions the right to speedy and public trial by an impartial jury of the States and districts wherein the alleged crime shall have been committed and to have the assistance of counsel for their defence It further lays down that excessive bail shall not be required, that excessive fines shall not be imposed and that cruel and unusual punishment shall not be inflicted and that private property shall not be taken for public use without just and adequate compensation Provision is also made that no soldier shall in time of peace be quartered in any private house without the consent of the owner, nor in time of war except in a manner to be prescribed by law The idea underlying the formulation of a charter is borrowed from English history which in its early stages afforded striking examples of flagrant breaches of the common law rights The framers of the American constitution were prompted by a desire to provide against the repetition of executive excesses in their country interfering with the rights and liberties of their citizens Paradoxical though it may sound in view of the American experiment, the people in the United Kingdom continue to depend for their fundamental

* The expression "peaceably" is exceedingly vague and is open to different interpretations by different persons But the fact that in the United States the ultimate decision rests with the judiciary in what may be called test cases constitutes some guarantee against executive lawlessness on the "peace" plea

† Select Constitutions of the World, pp 592 93, Munro The Constitution of the United States, pp 138 48 The amendments were passed by Congress on the 25th September, 1789 and ratified by three-fourths of the States on the 1st December, 1791.

rights not so much on legal instruments or statutory provisions as on judicial decisions

Provisions safeguarding the interests of the negroes

The Thirteenth amendment* provides that slavery or involuntary servitude, except by way of punishment for crime or crimes whereof the party concerned shall have been duly convicted, shall not be permitted within the United States or in any place subject to their jurisdiction † Congress is authorised under the article to enforce the law by appropriate measures On the strength of that provision it has often attempted to compel the Southern States to refrain from passing discriminatory laws against the negroes, but not with anything like a substantial measure of success The Supreme Court has held that Congress is not authorised by law to interfere with the States in this regard It should however, be noted that the Court has sought to nullify Federal measures not on the ground that in its judgment the persons for whom the guarantee is intended should not receive effective protection but on the ground that the Federal legislature has acted in excess of the powers delegated to it under the constitution and encroached upon the legitimate functions of the States to whom the police power belongs The exact measure of protection contemplated in the amendment was tested on the passing by Congress of the Civil Rights Act in 1866 before the adoption of the Fourteenth Amendment which sought to wipe out all burdens and disabilities the necessary incidents of slavery, constituting its substance and visible form and secure to all citizens the same right to make and enforce contracts to sue, be parties give evidence and to inherit, purchase lease sell and convey property as is enjoyed by white citizens Doubt was expressed by high authorities on the constitutionality of the measure particularly by the President who said that the provisions interfere with the municipal legislation of the States an absorption and assumption of power by the General Government which, if acquiesced in, must sap and destroy our federating system of limited powers and break down the barriers which preserve the rights of the States '

* Passed in February 1865 and ratified in December 1865

† Select Constitutions of the World pp. 594-95

The issue was, what were the incidents of slavery? It was decided by the Supreme Court in the Civil Rights cases which arose under the second Civil Rights Act of 1875, and an attempt was made to define the scope of both the Thirteenth and Fourteenth Amendments. Under the Thirteenth Amendment Federal legislation could be "direct and primary" in so far as it was "necessary and proper to eradicate all forms and incidents of slavery and involuntary servitude" whereas under the Fourteenth, it can only be "corrective in its character, addressed to counteract and afford relief against State regulations or proceedings".* The cases were instituted by writ of error by coloured persons, who had been denied accommodations in inns and theatres, and in one case in a woman's car on a certain railroad. It was argued that if Congress could provide the punishment of the hotel proprietor who had refused to lease out rooms to a negro, there was practically no limit to possible applications of Federal power. The question for determination was whether Congress had power to legislate for the obliteration and prevention of slavery with all its badges and incidents, and if so, whether the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance or a theatre, subjects that person to any form of servitude or slavery prohibited under the relevant Amendment. The Court held that such an act of refusal had nothing to do with slavery or involuntary servitude, and that if it violated any right of the aggrieved party, his remedy lay in the laws of the State concerned. It was further decided that if the State laws were adverse to his rights and did not protect him, then only recourse could be had to the corrective Federal legislation under the Fourteenth Amendment. The prohibition intended was against State action or action sanctioned by the State and not private measures against which the aggrieved party must, in the first instance, seek the protection of the State laws.†

The incidents of slavery.

According to the Fourteenth Amendment,‡ no State is permitted to make or enforce any law abridging the privileges or

* 109 United States, 3 (1883).
† *Ibid.*
‡ Passed in June, 1866, and ratified in July, 1868.

immunities of the citizens of the United States or deprive any person of life liberty or property without due process of law or to deny to any citizen within its jurisdiction equal protection of the law * Thus discrimination based on race colour or religion in the matter of civil liberties is ruled out Under Article IV, section 2, clause 1, the citizens of each State are assured all privileges and immunities of citizens in the several States † The second part of section 2 of Art XIV‡ was calculated to prevent the Southern States from depriving the negroes of the right to vote at the election of public servants by proposing to reduce the prescribed proportion of federal representation of the State or States which excluded the negroes from the suffrage § But the power reserved to Congress has not been effectively exercised against the offending States

Franchise rights are not to be curtailed or abridged on religious or colour grounds.

One of the most important provisions made for the purpose of protecting the rights of minorities is contained in Art XV section 1 of the constitution which lays down that the right of citizens to vote at elections shall not be denied or abridged by the Federal Government or by any constituent State on grounds of race colour or previous condition of servitude Congress having power under this article to make appropriate legislation This law was promulgated in order to protect the negroes against encroachment on their franchise by any particular State or by the United States of America There have been occasions when the Supreme Court was called upon to intervene in cases of violation of the provision Munro is of opinion that of all the

* Munro: The Constitution of the United States pp 155-56.

† Select Constitutions of the World, p 591.

‡ Representatives shall be apportioned among the several States according to their respective numbers counting the whole number of persons in each State excluding Indians not taxed But when the right to vote at any election for the choice of the electors for President and Vice-President of the U S. A. representatives in Congress the executive and judicial officers of a State or the members of the legislature thereof is denied to any of the male inhabitants of such State being 21 years of age and citizens of the United States or in any way abridged except for participation in rebellion or other crime the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens of 21 years of age in such State

§ Munro: The Constitution of the United States, pp. 156-57.

provisions in the Constitution or its amendments, this one has been the most freely honoured in the breach "* Neither Congress nor the Supreme Court has been able to prevent some of the Southern States from acting in defiance of the law

The scope of the Fourteenth Amendment

The picture, however, will not be complete unless attention is drawn to the manner in which the constitutional safeguards contained in those amendments have been in fact rendered null and void In a series of important cases the Supreme Court has held that the safeguards incorporated in the Fourteenth Amendment, as has already been indicated, were guarantees against acts or measures of the State or officials presumably acting on behalf and in the name of the State and were not intended to restrain or punish individual offenders † If, therefore, a negro complained that his right had been encroached upon in a particular case, it was for him to show that the action complained of was by the State or by some State officer acting under State authority. Nor is the negro assured of equality of treatment in respect of the personnel of the jury by Court decisions. A West Virginian law was of course contested with success on the ground that it confined the rights of jury service to whites ‡ In another case arising out of a law of Delaware the same principle " of immunity from inequality of legal protection either for life, liberty or property " was upheld § But the protection thus afforded does not apply even against an all-white jury unless it is proved that the appointment of the jury was deliberately discriminating against the negro An impanelling officer may easily succeed in uniformly ousting the negro from the juries by appearing so careless that he just inadvertently finds his juries composed consistently and uniformly of whitemen For that " inadvertence," as Professor Mclaughlin observes, there is probably no legal remedy ||

* Munro The Constitution of the United States, p 159

† United States v Cruikshank, 92 U S, 452 (1876); Civil Rights Cases, 109 U S, 3 (1883); Virginia v Rives, 100 U S, 313 (1880)

‡ Strander v West Virginia, 100 U S, 303, 310 (1880)

§ Neal v Delewane, 108 U S, 370 (1881)

|| Andrew C Mclaughlin A Constitutional History of the United States, p 725; Virginia v Rives, 100 U S, 313, 322-323 (1880)

The judicial interpretation of the amendment.

There are also other kinds of discrimination against the negroes An attempt has, for example, been made to set them aside as a separate class and the classification involved which apparently is not offensive but humiliating to a degree in actual effect has been repeatedly defended in the court It has been held that mere classification does not deprive the negroes of the equal protection of the law guaranteed in the Fourteenth Amendment and that the illegality occurs only where classification does not rest upon any reasonable basis but is essentially arbitrary * In *Plessy* v *Fergusson* the issue raised was the constitutionality of a Louisiana statute regarding railroad companies providing separate but equal accommodations for white and coloured peoples It was known as the Jim Crow Car law The measure was declared valid and in delivering the judgment Brown J remarked The object of the amendment (fourteenth) was undoubtedly to enforce the law but in the nature of things it could not have been intended to abolish distinctions based upon color or to enforce social as distinguished from political equality or a commingling of the two races upon terms unsatisfactory to either Attention was further called in the judgment to the provision for separate schools for white and coloured pupils which had been upheld by State Courts in several Northern States We are seriously asked to bear in mind that if one race be inferior to the other socially the constitution of the United States cannot put them upon the same plane, and one should not forget that it is a judicial pronouncement and not a politician s bluster The validity of classification has been recognised and upheld by the courts also in respect of matters educational A State is competent to prevent a private school from imparting education to white and negro children together † In certain circumstances in which it is difficult to expose the intention of a discriminatory measure and to challenge classification a school district is enabled to spend even public money upon the maintenance of an educational institution

* Landsley v Natural Carbonic Gas Co. 220 U S. 61, 78-79 (1911)
† Berea College v Kentucky 211 U.S. 45 (1908).

exclusively for the children of the whites * It may be that the courts will not uphold acts of glaring discrimination or validate unfair "classification," but the onus of proof lies on the aggrieved party and it is extremely difficult to discharge it with the result that the judges are tempted to sanction and sanctify the "colour" decrees of the white politicians

The futility of the franchise safeguard

Equally futile in effect has been the safeguard in connection with the basis of Federal representation and the conditions of its reduction When the Southern States were restored they were required to fulfil conditions almost similar to those prescribed for Arkansas It was laid down in the case of the latter that its constitution "shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognised" It is not for us here to discuss the fairness or the constitutionality of this provision or the limitations of the State right which it involves But as has been suggested, it was introduced obviously to protect the rights of the coloured peoples. We are brought face to face with an anomaly when this is read along with the power guaranteed to the individual States to modify their franchise laws provided any such modification entailed no discrimination based on colour, race or previous condition of servitude It produced its inevitable consequences Some of the Southern States proceeded to prescribe suffrage qualifications which were in conflict with the so-called "fundamental conditions" but apparently not with the provisions contained in the fifteenth amendment It was, for example, laid down in the constitution of Mississippi (1890, 1892) that every voter must be able to read any section of the State constitution or must be able to interpret it Although the condition was applicable both to whites and coloured peoples, it was the "blacks" who were generally found to be incompetent under the law by the election authorities to enjoy the right to vote The issue was now and then brought before the courts, and in *Willams* v *Mississippi*† it was held that

* Cunning v Country Board of Education, 175 U S, 528 (1899)
† 170 U S, 213, 225 (1898).

the constitution and Statutes of Mississippi had not on the face of it, discriminated between the races The court, however, had to admit that they left a dangerous loophole for what it was pleased to call the ' evil in administration We have also on the authority of Cooley, a recognised authority on the subject, that the requirement of a capitation tax or of ability to read is not a denial of the suffrage If the insistence on such qualifications decreased the number of voters in a State, that State s quota of representation in the Federal legislature could also be reduced under the constitution provided Congress could determine the actual basis for such representation What is significant is that for forty years the power has remained unused and that the politician and the man in the street have alike managed to forget it

What is due process of law ?

The clauses due process of law and the equal protection of the laws often perplexed the layman and left the lawyer guessing as to their juristic incidence They opened up a vast and unexplored region of judicial activity In *Hurtado* v *People of California* * the Supreme Court quoted with approval the language of Webster who defined the general law as being a ' law which hears before it condemns which proceeds upon enquiry and renders judgment only after trial so that every citizen shall hold his life, liberty property and immunities under the protection of the general laws which govern society † It was held therefore to exclude as not due process of law, acts of attainder bills of pains and penalties acts of confiscation acts reversing judgments and acts directly transferring one man s estate to another, legislative judgments and decrees and other similar special partial and arbitrary exertions of power under the forms of legislation. The court however denied that due process of law was meant or intended to include *ex vi termini* the institution and procedure of a grand jury in every case or in each and every State In a more recent case Mr Justice Brewer‡ conceded that a full discharge

* 110 United States, 516 (1884)

† 4 Wheaton, 518 581.

‡ Beets v Michigan, 186 U S. 505 507 (1903).

of their duties sometimes compels boards or officers of a purely ministerial character to determine questions of a legal or extra-legal nature and that due process is not necessarily judicial process But it was made definitely clear that when fundamental rights were involved the appeal lay to the judiciary on the question of the constitutionality of either procedure or result In the development of American administrative law there have often been conflicts between administrative necessity and the innate propensities of the courts to uphold law and vindicate justice The courts might have shown some relaxation in respect of forms, but not certainly, in respect of the substance of judicial protection They have by no means surrendered to administrative officers the right to determine whether their decisions or the method and procedure adopted by them constitute due process

What is "equal protection of the laws?"

On the judicial interpretation of "the equal protection of laws" the case of *Plessy* v *Fergusson* has already been cited The classification of railway compartments is by itself not repugnant to the protection guaranteed in the Amendment unless of course it was found to be essentially arbitrary In an earlier case* the Supreme Court had rejected the view taken by the Court of California of certain ordinances to the effect that the power given to the board of supervisors "is not confided to their discretion in the legal sense of that term, but is granted to their mere will," and held that reasons must be shown for every act of discrimination by the authorities concerned as between one section of the residents and another If any ordinance gave arbitrary power to a department of the administration by which they could at their sweet will accord differential treatment, then that ordinance violated the "equal protection" clause. It was held further that the clause gave, and was intended to give, equal protection of laws to citizens and aliens alike The provisions in question were universal in their application to all persons within the territorial jurisdiction irrespective of differences of race, colour or nationality, and "the equal protection of the laws is a pledge of the protection of equal laws" "Liberty" mentioned

* Yick Wo v. Hopkins (118 United States, 356, 1886).

in the amendment was defined in comprehensive terms by Mr Justice Peckham in *Allgeyer* v *Louisiana* in 1897 True liberty he observed means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties In 1923 and again in 1925 it was judicially held that liberty ' in the education of children was also protected † It appears from the language of the statute that the safeguards therein contemplated apply not only to citizens but also to aliens within the jurisdiction of the State concerned although Mr Justice Peckham refers to the citizen only in his interpretation of the expression

Discrimination between natural born and naturalised citizens.

As a general rule as has more than once been pointed out aliens and citizens are not equally treated in respect of political rights Nor are all citizens treated alike in all matters The distinction is sometimes observed in law between natural born citizens and naturalised citizens ‡ In the United States for instance the office of the President is not open to any person except a natural born citizen § In the original constitution no such restriction was imposed regarding the eligibility for the office of the Vice-President This anomaly gave rise to a difficult and awkward situation during the period from 1788 to 1804 when there was provision *for automatic promotion from the* office of the Vice-President to that of the President || A Vice-President not being a natural born citizen often claimed his right to succession to the Presidentship The anomaly was removed by the last clause of the Twelfth Amendment passed in 1804 ¶ which provides that no person ineligible by law for the office of the President shall be eligible for that of the Vice-President of the United States The position to-day therefore is that

* 165 U S 578 589 590

† Meyer v Nebraska, 262 U S 390 (1923) Pierce v Society of Sisters 268 U.S., 510 (1925)

‡ *Cf* the provisions of the British Nationality and Status of Aliens Act, 1914 as amended in 1918.

§ Art. II, Section 1 (5)

|| Select Constitutions of the World, p. 589.

¶ Munro : The Constitution of the United States pp. 77 78,

The cantonal powers include taxation, education, industry and legislation and other matters which are not specifically delegated to the Federal Government Some of the cantons are ruled by primary assemblies in which every adult citizen can speak and vote, and others have representative assemblies Then the Swiss people have developed certain well known instruments of democratic government, namely referendum initiative and recall No one can disallow laws except the people themselves It is thus clear that the very system of government prevalent in Switzerland guarantees a considerable measure of protection to all communities and all classes of citizens inhabiting that land And it is well to bear in mind that nearly two-thirds of the population there speak German a large number French, a few Italian and a few others Romansch or Latin A large majority of German speaking and French speaking people are Protestants while the rest are Roman Catholics *

Conditions of acquisition of Swiss nationality

The Swiss law of nationality is governed by the Federal Constitution of 1874, as amended in 1928, and supplemented by the Federal decree of 1903, Civil Code of 1907, Federal Law of 1920, and Instruction of 1923 † Every citizen of a canton becomes *ipso facto* a Swiss national who cannot be expelled from either the territory of the confederation or from his canton of origin The Federal Government makes the regulations concerning the acquisition or loss of Swiss citizenship and prescribes the manner in which such citizenship may be recovered According to the decree promulgated under Art 44 of the Federal Constitution, a foreigner who desires to acquire the nationality of Switzerland is required to apply to the Federal Government for permission to acquire communal and cantonal citizenship and to prove that he has regularly resided for two years in Switzerland immediately before making the application This provision has been amended by the law of 1920 which has considerably affected the period of residence

* Bryce: Modern Democracies Vol. 1 Chapter 27

† Flournoy and Hudson. Nationality Laws pp 556-66

The present law of Swiss nationality

The present law is that permission is granted to such applicants only as, during the last twelve years before the application was made, have really resided in Switzerland for at least six years according to a permit of sojourn or domiciliation issued by the competent authorities * Aliens, who are born in Switzerland and have resided there for at least ten years during the first twenty years of their lives, are entitled to obtain authorisation after residence of three years during the five years which precede their requests In either case, the applicant for naturalisation must have lived continuously in Switzerland for the last two years before he made the application The Federal Council reserves to itself the right of examining the connections of the applicant with his country of origin and his other personal and family circumstances Permission may be refused, if those conditions are such as, in the opinion of the Council, would render the naturalisation of the applicant in any way harmful or disadvantageous to the confederation If any application for naturalisation is executed in a language other than German, French or Italian, it must be accompanied by reliable translation in either of these three languages Under Art 47 of the Federal Constitution the Federal Government have power by legislation to define the difference between settlement and temporary residence and at the same time to prescribe regulations governing the political and civil rights of Swiss citizens during temporary residence

The main features of the constitution

Bryce has pointed out three features of the Swiss Constitution The first feature refers to the distribution of powers between the Federal Government and the Cantonal Governments and has already been referred to The second feature is that the constitution does not contain any Bill of Rights such as is understood in the United States and in various other democratic countries There is no provision in Swiss constitutional law for trial by jury Death sentences had, however, been forbidden for political offences That provision in the original constitution was amended by referendum on May 18, 1879 The voting was for capital punishment 200,485

* Flournoy and Hudson Nationality Laws, p 561.

votes and 15 cantons, against 1,815,888 votes 7 cantons * There are, besides, certain other safeguards All Swiss citizens, for example, are equal before law Switzerland observes no privileges of rank, birth, person or family † The citizens, as defined in the laws in force, are entitled to take part at their places of residence in all federal elections and pollings ‡ No canton can expel from its territory any of its citizens or can deprive him of his rights as a native or burgher § The right of movement from one part of the country to another on the part of a citizen, or of settlement in any part thereof is recognised That right is denied only to persons who have been deprived of their civil rights for penal convictions and who have been repeatedly sentenced for grave misdemeanours ‖ Liberty of the Press is guaranteed but steps may be taken by the cantons with the approval of the Federal Council to suppress or prevent abuse of such liberty The Federal authority is entitled to prescribe penalties for gross Press attacks upon itself Citizens have the right to form associations provided that their objects and methods are not subversive of law and order Here again the cantons are given powers of legislation to prevent abuse of the right The right of petition to the authorities for redress of grievances is conferred on the citizens who cannot be withdrawn from the proper judge Accordingly the establishment of extra ordinary tribunals is not valid in law and ecclesiastical jurisdiction has been abolished In matters of legislation and judicial proceedings every canton is bound to accord citizens of other constituent cantons of the Confederation the same treatment as is meted out to its own citizens Bryce does not therefore seem to be quite right when he says that a table of fundamental rights is lacking in Switzerland although the Swiss laws in this regard may not be as exhaustive as those in the United States of America or Germany

* Bryce Modern Democracies Vol. I pp 369-85
† Art. 4
‡ Art. 43.
§ Art. 44.
‖ Art. 45.

The third feature refers to provisions relating to religion * There is, to begin with, complete liberty of conscience and freedom of worship No citizen can be compelled to swear allegiance to any religious association, submit to any religious instruction, perform any religious act or incur any penalties by reason of his religious opinion or religious observances In conformity with the principles thus laid down parents and guardians may determine and guide the religious education of their children or wards up to the age of sixteen years Civil or political rights cannot be abridged or limited by any ecclesiastical provisions or religious requirements or conditions of any kind whatsoever Nor shall religious views absolve anybody from the performance of civic duties Nor again shall taxes be imposed upon anybody the proceeds of which are specifically appropriated to a religious body or community of which he is not a member The free exercise of religion is guaranteed within the limits compatible with public order or morality Both the confederation and the cantons have power to adopt legislative measures to maintain peace between members of different religious communities and to prevent encroachments by ecclesiastical authorities upon the rights of citizens and of the State

Provisions for religious freedom and equality

No bishopric can be created without the approval of the Federal Government Neither the order of Jesuits nor any society affiliated to it is allowed to exist in Switzerland All activities connected with school and church are forbidden to members belonging to the order and the societies subordinate to it The Federal Government is entitled to apply this prohibition to other religious orders or societies whose policies and methods are inimical to the State and calculated to disturb inter-denominational peace The law prohibits the founding of new religious orders or houses or the restoration of those which have been suppressed No impediment to marriage is permitted on grounds of religious belief Burial places belong to the civil authorities and not to any religious organisations, and the civil authorities are under legal obligation

* Bryce Modern Democracies, Vol I, pp 382-85

to provide that every deceased person, whatever his language, race or religion, may receive a decent burial

Special safeguards for religious and linguistic minorities.

Protection is also extended to the minorities in various other ways It is provided, for example, that schools maintained out of public funds must be open to children of all religious faiths without prejudice to them in any way in respect of their belief or conscience * Then again, the three spoken languages in Switzerland, namely Ger ian, French and Italian are treated and recognised as the national inguages of the confederation † Further, the Federal Assembly 'hich is vested under the constitution with the power of appoint ig judges of the Federal tribunal or their substitutes, is required) pay regard to the representation of each of the three national inguages ‡ The Federal tribunal sits at Lausanne, a concession) the sentiment of the French speaking cantons whereas the legis iture has its headquarters at German speaking Bern §

In addition to the legal and constitutional provisions, steps ave also been taken to give the minorities some representation ı the executive of the confederation and of the cantons The 'ederal executive power is entrusted to a Council (*Bundesrath*) omposed of seven members This Council is not respon ible to the legislature and removable by it as in the Inited Kingdom Nor is it independent of the legisla ire as in the United States It has nothing to do with party politics is not chosen to do party work does not deter mine party policy yet is not wholly without party colour || It is elected by the Federal Assembly and has life for three years From any one canton not more than one Councillor can be taken This emphasises the equality of the cantons in sharing in the highest executive authority of the State ¶ Further, custom prescribes that one Councillor shall always come from Bern and

* Art. 27
† Art. 116.
‡ Art. 107
§ Bryce Modern Democracies Vol. I p 400
|| Ibid Vol. I, p. 394.
¶ Pitamic: A Treatise on the State p. 80

another from Zurich; and one is usually chosen from the important French-speaking Canton Vand One is also taken by custom from a Roman Catholic Canton, and (very often) one from the Italian-speaking Ticino "*

The same principle followed in the cantonal council

Similarly in regard to the composition of the small (or executive) council of the canton, the same principle is followed This council is subordinate to the cantonal great council which is a legislative body and can direct the executive and reverse its decisions on questions of policy as well as in matters of detail The function of the executive council is to report, submit measures and draft bills, whenever required to do so Like its federal counterpart, it is more or less a business committee with little or no political colour, for its members are not generally chosen on party lines The vote for election of the council is taken on a general ticket and there is no provision for separate electorates Several cantons have adopted the method of proportional representation in order, as Bryce says, that each important section of the people may have its representatives on the council and its share of offices It has also been found that in nearly every canton the interests of a minority or minorities are represented on the council by one or more spokesmen, no matter whether proportional representation exists there or not

Germany

The German Constitution

We now come to the two most important post-war democracies,† namely, Germany and Russia It is common knowledge that the whole machinery of Germany has undergone a radical change after the War Her boundaries have been reduced and her Imperial autocracy has given place to a democratic republic at least on paper. Germany is now in theory governed according to the constitution adopted in 1919 Like every sovereign State she exercises the right to lay down her own law of nationality; and that right is conferred upon the Reich by Art 6 of the constitution.

* Bryce Modern Democracies, Vol 1, p 380

† There is a definite and rather aggressive challenge to the so called democracy in Germany under the Nazi administration

She has the exclusive power of legislation not only in regard to nationality, but freedom of domicile, immigration, emigration and extradition *

The German declaration of rights is one of the most exhaustive and comprehensive charters in world's history In fact, almost the whole of the second part of the constitution, consisting as it does of more than one hundred and seventy one articles, deals with the fundamental rights and duties of German citizens In addition, there is the last section of the first part which enshrines principles seeking to give them legal and judicial protection in various ways

A comprehensive table of Fundamental Rights.

The charter dealing with the fundamental rights† makes ample economic provisions, guarantees a certain measure of protection in educational religious and linguistic matters and establishes what in England and the British Commonwealth is called the rule of law All Germans are equal in the eye of law and the civil rights are fundamentally the same for all citizens including men and women Privileges or disadvantages of birth or rank have been abolished Citizens enjoy full and complete personal liberty No encroachment upon or deprivation of personal liberty by any public authority is permitted except in accordance with law Those who are deprived of their liberty are entitled to call for information as to the grounds on which the deprivation of liberty has been ordered and what authority has made that order and to claim the right to make legal complaints against such deprivation The residence of every German is regarded as his inviolable sanctuary No public authority is permitted to invade or raid it except under

* In accordance with a decree the Minister of the Interior sought to amend the German law of citizenship and confiscated the property of a number of famous Germans now abroad who have injured German interests by their behaviour which conflicts with their duty and loyalty to their nation and the Reich (August, 1933) Again under a subsequent law another step forward in the process of Germanisation is contemplated The object underlying the measure is to outlaw Jews and other peoples whom the German Chancellor and his advisers regard as non-Aryans. Unworthy persons and enemies of the State would be deprived of German citizenship and to that class of people must necessarily belong non-German races and perhaps also persons not in sympathy with Hitler's dictatorship.

† The German Constitution Part II Sec I Arts. 109-18.

special circumstances recognised by law He enjoys the right, within the limits prescribed by law, to express his opinion openly and freely by speech, in writing or through pictures or in any other manner No censorship is allowed except regulations by law in respect of cinematograph entertainments The public authorities may adopt measures for the purpose of combating obscene literature and pictures and also for the protection of morals in public exhibitions and performances Every citizen enjoys the right of free movement from one part of the country to another and may settle anywhere he likes within the Reich, acquire landed property there and adopt whatever means of livelihood appeals to him He is also entitled to emigrate to countries outside of the Reich and to claim the protection of his Government *vis-a-vis* foreign authorities The sanctity of private correspondence through the post, telegraph and telephone is strictly observed

The right of public meetings and associations no discrimination in regard to appointment to public services on grounds of race and language

The German citizens are entitled, without notification or special permission, to assemble at public meetings The right to form unions and associations, religious or otherwise, is guaranteed to them, subject to preventive regulations in emergencies The legal rights which are otherwise acquirable cannot be refused to a union or an association on the ground that its objects are of a religious, political or socio-political nature Citizens enjoy the right to address petitions and complaints to the competent authorities or the representatives of the people This right may be exercised by them either individually or through associations They are, without distinction, eligible for admission to public offices according to their abilities and qualifications, and there is no discrimination based on language, race or sex Public servants are given special protection under the law in regard to security of tenure, transfer from one office to another, pensions and provisions for their dependents They are regarded as servants of the community and not of any particular group or party They are entitled to hold any political views and enjoy the right of association Citizens have certain obligations to discharge They have, for instance, to undertake the duties of honorary offices and render

personal service to the State and local authorities and contribute in proportion to their means to the public revenues *

Safeguards for religion; no State Church recognised but missionaries and preachers allowed to preach in the Army hospitals and prisons.

The Germans enjoy full liberty of religion and conscience They cannot be disturbed in the free exercise of their religion † Nor are civil and political rights dependent on or restricted by any religious creed No one can be debarred from admission to Government service on grounds of his religion No one is bound to disclose his religious conviction or may be compelled to take part in any religious ceremony or to participate in any religious observances or to make use of any religious form of oath There is no State church in Germany although religious protection is guaranteed by the State Religious bodies are given power to regulate and administer their affairs independently and to appoint their officers without consultation with State or local authority Those bodies which are legal corporations can levy taxes on the basis of the civic tax rolls All religious bodies and associations are treated on terms of equality The property and other rights of such bodies and associations are guaranteed under the law Missionaries attached to them have the right of entry for the purposes of preaching into the army, prisons, hospitals and other public institutions but cannot use any kind of compulsion Sundays and other holidays are according to law, treated as days of rest and of spiritual advancement and members even of the armed forces are given free time required for the performance of religious duties ‡

The protection of minorities rights in schools guaranteed.

The whole system of education in Germany is under the supervision of the State which reserves to itself the power to delegate its functions, in certain respects to local authorities It is laid down that upon the basis of pri

* The German Constitution Part II Sec. II Arts. 119-34.

† How ruthlessly these safeguards have been violated will be clear from the fact that Nazi dogma has practically become church law for Prussia Seven out of the twelve General Superintendents of the Protestant Church who voted against the motion to debar non Aryans or persons married to non Aryans from holding church office or preaching have been pensioned off

‡ The German Constitution Part II Sec. III Arts. 135-41.

mary schools common to all is to be built up the system of secondary and higher education The development must be organic Subject to that general principle, primary schools may be established in a locality on the request of persons responsible for the education of children in accordance with their religious creed or views on the problems of life and philosophy. Their desires and wishes must always be taken into account, as far as possible As a general rule, the maintenance of primary schools as substitutes for those controlled and managed by the State is illegal. On certain conditions, however, steps may be taken to establish and maintain primary schools but previous approval of the State is essential One of the conditions laid down is that private primary schools are permissible in a locality where there is no public primary school corresponding to the religious creed of a minority who are responsible for the education of children It is the duty of all schools to inculcate moral virtues, civic consciousness and a sense of German nationality Religious instruction is of course a regular subject of study in schools, except in the case of purely secular schools Such instruction must correspond to the principles of the religious body or association concerned, the State having the right of general supervision No religious instruction can be given save with the declared assent of the teachers, nor can participation in religious instruction and religious ceremonies and observances be enforced, except with the declared assent of the person or persons responsible for the education of the children In giving instruction in State schools the teacher must take care that no offence is given to the religious susceptibilities of those holding different opinions It is provided that theological faculties in the Universities must continue to be maintained *

The organisation of economic life of Germany is sought to be regulated by the constitution in accordance with the principles of justice, equity and commonsense The economic freedom of each individual is guaranteed and legal compulsion is permissible only when it is necessary to enforce certain rights which are

* The German Constitution, Part II, Sec IV, Arts 142-49

threatened or to serve the paramount claims of the Common wealth In economic relations freedom of contract prevails Usury is forbidden Private property is guaranteed by the constitution, but its ownership involves certain obligations Expropriation may be effected only for the benefit of the community and in accordance with the provisions of law It shall be accompanied by due compensation save in so far as may be otherwise provided by the law of the Reich The right of inheritance is recognised, but the distribution and the use of land must be supervised by the State in order to prevent abuse and to secure to every German a healthy dwelling and to all German families, particularly those of many children a dwelling and an economic homestead suited to their multifarious needs Landed property may be taken by the State, when required to meet the needs of housing, and for the purposes of land settlement and improvement and development of husbandry The cultivation and full utilisation of the land is a duty imposed by the State upon the land-owner Increment in the value of land, not due to any expenditure of labour and capital shall be devoted to the uses of the community All riches in the soil and natural sources of power which might be utilised for the purposes of economic and industrial development must be under the control of the State The Reich is given power under law to transfer to public ownership economic undertakings or concerns which are suitable for socialisation without prejudice to the payment of compensation In the larger economic interests of the community and in the case of pressing necessity the Federal Government may by appropriate legislation compel economic undertakings and associations to combine on a self governing basis in order to ensure the co-operation of all factors of production, associate employers and employees in the management thereof and regulate production manufacture, distribution, consumption and import and export of commodities

The organisation of economic life in Germany; extensive safeguards for labour provided for

The Reich gives special protection to labour and guarantees freedom of association for the maintenance and improvement of Labour and economic conditions All agreements

contracts and measures restricting or obstructing such freedom are illegal The employee or workman has a right to such free time as is necessary for the exercise of his civic rights and for the discharge of his civic obligations The Reich is given power to promulgate a comprehensive system of insurance for the maintenance of health and fitness for work, for the protection of motherhood and for safeguards against the economic consequences of old age, infirmity and the vicissitudes of life Power is also conferred upon it by the constitution to enunciate proposals for international regulation of the conditions of workers so that the working class of the world may secure a universal minimum of social rights It is provided that the independent middle class in agriculture, industry and commerce shall be encouraged by legislation and administrative measures and protected against all forms of exploitation or oppression

Labour represented on the Economic Councils of the Reich

By far the most important provisions in the German constitution are those relating to the economic councils of various kinds and the right of every German citizen to the kind of work for which he is qualified or, in the alternative, to his maintenance at public expense * We find, for example, that workers and salaried employees enjoy equal right with the employers to regulate, in co-operation, wages, conditions of labour and factors of production for the general economic development of the country The former are given representation in Workers' Councils for individual undertakings and in District Workers' Councils and also in the Workers' Council of the Reich The District Workers' Councils and the Workers' Council of the Reich are called upon to combine with the representatives of employers and other classes of the people concerned to form District Economic Councils and an Economic Council of the Reich for the purpose of carrying on all their joint economic functions and endeavours and of co-operating in the enforcement of laws relating to socialisation The District Economic Councils and the Economic Council of the Reich shall be so constituted as to

* The German Constitution, Part II, Sec V, Arts 151-65

provide representation thereon for all important vocational groups in proportion to their economic and social importance The Federal Government is under obligation to submit to the Economic Councils of the Reich for its opinion all Bills of fundamental importance dealing with social and economic legislation before introducing them into the legislature Besides, the Council has itself the right to propose such legislation Whether the Federal Government agrees to such a proposal or not it has got to introduce it into the Reichstag accompanied by a statement of its own views on the proposal promulgated by the Council The Council may send one of its members to the Reichstag to advocate adoption by the legislature of its scheme Thus in economic and industrial matters the Economic Council of the Reich is practically a State within State, but safeguards against possible dangers exist in the emergency powers vested in the Central executive

Citizens must be given work or maintained at State expense.

One of the basic ideas of the German Constitution is that every citizen is bound to do work on the one hand and on the other is entitled to have work found for him or in the absence of work to be maintained at State expense It would be too much to say that these ideals have been realised or that efficient institutions have been devised to secure them But they have gained a definite foothold in the minds of those who regulate the activities of the State and it is only a question of time and opportunity for them to be translated into daily practices * The relevant law on the subject is clearly defined in the constitution and reads as follows †

> It is the moral duty of every German without prejudice to his personal liberty to make such use of his mental and bodily powers as shall be necessary for the welfare of the community Every German must be afforded an opportunity to gain his livelihood by economic labour Where no suitable opportunity of work can be found for him provision shall be made for his support

* Sastri Kamala Lectures (published by Calcutta University) p. 10
† Art 163.

Russia.

The basic philosophy of the Soviet Republic

Far more revolutionary are the constitutional changes that have been brought about in Russia As a matter of fact, reaction has been most effective in that country The memories of the Czarist absolutism have been sought to be obliterated by a drastic resort to an entirely communistic form of government with a programme of the expropriation of private property as its main and fundamental basis The Russian Republic is now a free Socialist community of all workers and peasants of Russia All authority is vested in them organised in the urban and rural Soviets. The autonomous regional unions have entered into the Soviet Republic apparently on a federal basis The distinction is made between workers and their employers, the latter having no place in any organ of Government *

The Russian law of citizenship conditions of admission to citizenship

The law relating to Russian citizenship is very simple and is regulated by the Acts of 1921 and of 1925 and the decree of 1924 The first deals with the laws of nationality proper It enumerates different classes of persons who are deprived of the rights and privileges of Russian citizenship Such persons are those who left Russia after November 7, 1917, without the permission of the Soviet authorities, those who have resided abroad without interruption for more than five years without having received, before June 1, 1922, foreign passports from the representative of the Soviet Government and those who have of their own accord served in the armies fighting against the Soviet authority or have, in any way, taken part in counter-revolutionary organisations Those provisions received their inspiration from Article 23 of the constitution in which it is stated that in the general interests of the working class the Soviet Republic deprives individuals and sections of the community of any privilege which may be used by them to the detriment of the Socialist revolution The law of November, 1925, contains a number of provisions dealing with

* Art 7.

the loss of citizenship by prisoners of war and interned persons in military service who fought in the Czarist and Red Armies and failed to get themselves registered within the period prescribed by law * But the subject of nationality is more exhaustively treat ed in the Decree of 1924 † That law establishes a single Union nationality for citizens of the constituent republics of the Union

The law tolerant towards foreigners

Every person in the territory of the Union is deemed to be its national in so far as he does not prove that he is a foreign citizen The Russian law however is tolerant towards foreigners, for it extends to them generally the rights and privileges which in many other countries are reserved for their nationals But there are two conditions which have got to be fulfilled by foreigners before acquisition of Russian citizenship In the first place foreign citizens residing in its territory must work at an occupation and belong to the working class or to the peasantry working without hired labour This condition is to be found in Article 20 of the constitution which recognises the soli darity of workers of all nations and authorises the local Soviets as also the Federal Republic to confer upon such foreigners with out any annoying formality the rights of Russian citizenship This provision is supported in Article 64 and is also embodied in section 2 of the Decree of 1924 The second condition which again is dealt with in the decree is that foreigners ad mitted to the citizenship of the Union must not enjoy the rights pertaining to citizenship of other States Implicit in these conditions is the requirement that the Russians or foreign ers who have been recognised as the citizens of that country, must believe in and abide by its fundamental laws and the princi ples of its government as indicated in Article 3 of the constitution which has laid down certain constitutional formulae with the fundamental aim of suppressing all exploitation of man by man, of abolishing for ever the division of society into classes, of ruth lessly suppressing all exploiters of bringing about the socialist

* Text from British Parliamentary Papers Misc. No 2 (1937) CMD 2852.
† Ibid.

organisation of society and of establishing the triumph of socialism in all countries."

Russian citizens enjoy in law the liberty to express their opinion; and in order to make it effective and real the Socialist Republic has put an end to the dependence of the Press upon capital, has transferred to the working class all the technical and material resources required for the publication of newspapers, pamphlets, books and other printed matter The circulation of newspapers, etc., is guaranteed throughout the country, complete freedom of meeting and assembly has been conferred upon the people, and the Republic is under obligation to place at their disposal all premises convenient for public gatherings together with lighting and necessary furniture. To ensure freedom of association, the Republic lends the citizens all its material and moral assistance to organise themselves The economic and political power of the propertied classes has been abolished with that end in view, and obstacles which, in capitalistic society, stood in the way of the labouring population enjoying freedom of association and action, have been removed

Freedom of the Press, of associations and of meetings guaranteed

The Republic recognises equality of all citizens in the eye of law irrespective of their race, colour or creed, and does not tolerate privileges or prerogatives founded on such grounds It declares repugnant to its fundamental laws the repressing of national minorities or, in any way, limitation or infringement of their rights The church has been separated from the State and the school from the church Every citizen is entitled to carry on religious or anti-religious propaganda thereby securing complete liberty of conscience The Republic grants the right of asylum to all foreigners prosecuted for political and religious offences

No racial and religious discrimination permitted, national minorities must not be repressed

The State is bound to provide for workers and the poorer peasants universal and free education It is the duty of all citizens to defend, and for that purpose the Republic has established universal military service thereby extending to the people the right of bearing arms,

Franchise extended to all citizens save capitalists, owners of private property, employers, monks and priests and employees of the Czar

The constitution has conferred the right to vote and to stand for election to the Soviets on all citizens of the State without distinction of sect, religion or race and without any residential qualification This right is subject to the condition that those who claim it must show that they are *bonafide* workers and peasants or soldiers in the army or the navy of the Republic The condition owes its origin to the principle proclaimed and established in Russia—' He that does not work, neither shall he eat * Among those excluded from the franchise and the right to offer for election are persons who employ others for the sake of private profit or live on income not arising from their own labour private business men, agents and middlemen, agents and employees of the former police and secret service members of the late ruling dynasty of Russia and monks and priests of all religious denominations †

How far the Republic is federal.

There are at present 15 autonomous republics and 18 autonomous regions of which 11 and 15 respectively owe allegiance to the R S F S R According to the last census it contains no less than 185 nationalities speaking 147 languages Principal among the nationalities are Russians Ukrainians and white Russians The picture is one of extraordinary diversity in language race, religion and stages of cultural development The right accorded under the constitution to the individual nationalities to separate upon decisions of the Congress of Soviets and upon appeal of the supreme organs of the R S F S R , into autonomous Socialist Soviet Republics and regions may be regarded as a constitutional instrument of protection for the rights of nationalities The provision seems to be anomalous, for *while* each Union republic retains the right of free withdrawal from the Union *the fact cannot be ignored that even the alteration of* boundaries of any constituent republic requires the assent of every *member of the Federation and that* amendment of the Union constitution can be effected by the Congress of Soviets of the U S S R without the approval of the republics The central

* Art 18.
† Art. 65

authority again has not only unlimited control over economic life and activity but has power to repeal or suspend acts or measures promulgated by the Congress or the Central Committees of the so-called republics The result in actual fact is that State sovereignty is practically *non est,* and the term federal in relation to the Union is used without sufficient justification As a resolution of the communist party adopted in 1919 emphasised, the federal system was only " one of the transitional stages on the road to complete unity " But nothing was spared to complete the transition, although a Peoples' Commissariat for nationalities had been set up with representatives from the various national groups whose duty included the " study and execution of all measures necessary to guarantee the interests of national minorities on the territory of other nationalities of the Russian Soviet Federation and the settlement of all litigious questions arising from the mixture of nationalities "

Efforts at de-nationalisation

The Commissariat was abolished when the formation of national republics and regions was an accomplished fact along with their final unification The communist party played a large part in moulding the constitution of the U S S R on the basis of absolute equality of all nationalities, representation of national republics or regions in the central organs and a large and wide measure of cultural autonomy for the States The Commissariat was replaced by the Central Executive Committee, an organisation of a bicameral type composed as it was and is of two bodies, namely, the Union Soviet and the Soviet of nationalities No measure is accepted as law unless adopted by both the bodies which sometimes sit separately and sometimes together Differences between them are adjusted by arbitration The Soviet of nationalities consists of five representatives from each autonomous republic and one from each autonomous region The actual power of law-making, however, does not belong to them It is exercised by the bureaucracy who represent the communist party But the fact of centralisation does not mean that the legitimate rights of the national minorities are being ignored and neglected and suppressed Stalin himself is a member of a minority community and there is a general charge that most of the Soviet leaders

are non Russian They have been particularly anxious to dissociate nationality from the questions of State, to establish the principles of racial equality which are so dear to them, to prevent the supremacy of Russian culture and nationalism and to convert Russia into an un national or multi national State Their achievement may fall short of their ideal, but the ideal by itself is not without its value

Provisions for linguistic and cultural rights

Nor again can their actual achievement be lightly brushed aside The use of official languages is of course dictated by considerations of administrative efficiency In the Union republics the language is that of the dominant nationality while outside the R S F S R Russian is recognised as a second language Those autonomous republics, which owe allegiance to the R S F S R , speak two official languages, *viz* , the local language and Russian Those of them which are dependent on another Union republic recognise the language of the republic, the local language and Russian Absolute freedom is enjoyed by every citizen in communicating with the administrative authorities in his own language and, if he so desires, written official documents may be addressed to him in that language In the courts of law also he has the right to use his own language As has already been indicated, the Union republics are autonomous in all cultural matters But the central authorities reserve to themselves the right to enunciate general principles in popular instruction with the result that legislation in that behalf is more or less uniform in all the constituent units of the U S S R On account, however, of the different stages of cultural development of the nationalities constituting the Soviet Republic and of the need for expansion and progress along regional lines the nationalities have been divided into four distinct groups At the top stand those nationalities such as the Russians, the Ukrainians, the white Russians, the Georgians and Armenians who inhabit compact areas, have their own culture and historical tradition and conduct all stages of education elementary secondary and higher, through the medium of their own languages * Then come those large nationalities

Year Book of Education 1933.

who have their own alphabets Primary and secondary education is imparted to their children in their own languages while the Russian influence continues to permeate University education, although there is provision for special language Chairs under the aegis of Russian institutions in their areas The third group consists of compact nationalities who have no national alphabet and no national culture but who use their native language in their daily life They receive primary education through the medium of their mother-tongue but secondary and higher education in Russian. Lastly, come those scattered tribes who have no alphabet, no culture and little or nothing of what we have learnt to call civilisation Their children are taught in Russian schools in Russian Efforts are now being made to raise those peoples in the scale of culture and civilisation Large educational facilities are being placed at the disposal of the third group while to impart elementary education in their own tongue to the fourth group is being experimented with *

The Russian purging not directed against any "national minority" as such

But while all these are admitted and well-known facts, it cannot be denied that the Federal Republic has practically become a *Leviathan*. If by "self-determination" or "autonomy" is meant the right of a national group to determine the type and nature of its social and political structure and to decide whether it should secede from the Union or not, then the less said of the so-called autonomous units the better There is no State freedom in political and economic matters The dictatorship of the proletariat is on the saddle and no wonder "self-determination" solemnly promised to national or regional groups has been reduced to a myth But the proletarian crusade is by no means directed against any national minority as such It represents an attack upon a certain type of social and political institutions In Hitler's Germany we have got what may be called national purging In Stalin's Russia the purging is of an entirely different sort It is largely and essentially economic. In the first case, minorities are faced with threats of violent extinction In the second

* Soviet Russia in the Second Decade Report of the Trade Union Delegation (1928)

case, the slogan is to abolish private property and to clear the State of all property holders whatever their nationality In either case, however, the spirit is one of intolerance and one will not be surprised if even in Russia that spirit some day will claim national minorities as its victims, particularly when the coercive power of the State changes hands

Conclusion

To sum up in the preceding pages an attempt has been made to enumerate the safeguards incorporated in the constitutions of U S A , Switzerland Germany and Russia But sometimes the protection exists on paper and is not actually given effect Sometimes again it has been made to disappear from the constitution U S A and Switzerland are comparatively old democracies and the conditions in these countries have more or less been stabilized so that the form of the State is more or less reflected in its actual working, although even in America the rights guaranteed to the negroes under the constitution have been by administrative action violated on many occasions A war was necessary to dispossess the slave-owners of the Southern States It was then found out that the gulf between the advocates and the opponents of slavery was too profound and vital to be bridged by a compromise and a bloody conflict was necessary to solve the issue The chapter of ill treatment meted out to the negroes has not been closed * Nor can it be said that the antagonism between interests other than racial interests has been eliminated On the contrary that antagonism is spreading wider and wider and sinking deeper and deeper with the result that the constitutional guarantees in regard to the fundamental rights of citizens seem to have become more apparent than real The divorce between ownership and control is perhaps more complete in America than in any other modern State The custodians of what may be called the vested interests are using their influence for political purposes and it is an influence which has become almost irresistible The judiciary in the opinion of some thoughtful men, is so constituted that the poor and down

* Read in this connection Arthur Raper's *The Tragedy of Lynching* (Oxford University Press)

trodden cannot expect adequate relief from oppression at its hands to which they are entitled. Professor Laski points to the execution of Sacca and Vanzetti, the prolonged imprisonment of Mooney and the history of American strikes as being conclusive evidence of the futility of appeal to the Court for redress. He goes so far as to say that an American Presidential campaign is "a four months' debauchery."* He thinks that the main item in the defeat of Mr. Alfred E. Smith, at the election of 1928, was the fact that he was a Roman Catholic and that he did not possess the social habits usually associated with the Presidency of the Republic. Appointment of the Supreme Court has always been controlled by parties and caucuses which are dominated by a particular philosophy of life. Nomination is generally given to a man who is known to hold sound views on the problems of life and administration and "soundness" here means that he does not challenge the basic assumptions on which society is built. That is why, as we are told by Professor Laski, men like Mr. Justice Brandeis and Mr. Justice Holmes have been rare in the bench. The result is that the Courts are not neutral instruments of justice which decide, without bias and prejudice, the issues brought before them.† The judges are traditionally attached to the past and interpret the law in the terms of the country's past traditions, however revolting they may be to the principles of justice and equity. In those cases where the judges show their independence of judgment and impartiality regardless of the trend of prevalent political opinion, their decisions are sought to be nullified by popular veto. It is no use making law unless the vast mass of the people are prepared to accept its consequences. This is proved by the fact that in the United States the most solemn declarations embodied in the constitution have often failed to give the protection of law to the negroes. They are entitled to the franchise on the condition in the South that they do not exercise their vote. They are entitled to use the railways as a public carrier provided always that they do not ask for the amenities which they provide. All

How and where American declarations of rights are violated

* H. J. Laski: Democracy in Crisis, p. 69.

† In overruling a series of recent Federal laws on grounds of "illegality" the Supreme Court has shown a large measure of independence.

this shows that a constitutional charter solemnly signed may be reduced to a mere scrap of paper and we agree with Professor Laski that so long as man s power to shape the character of law is unequal, its incidence also is bound to be biassed *

Far more striking, however, is the position in Germany and Russia These are new 'democracies' Things have not yet settled down Naturally, greater difficulties face the leaders in applying the provisions in law and making the operation of laws conform to their substance The effective protection of minorities presupposes, as we have previously pointed out, the existence of a perfectly democratic type of government and administration Whether a particular type is democratic or not depends upon factors which may be stated to be (I) whether the people have ultimate control (II) whether the people can easily bring about changes in the constitutional machinery (III) whether the people have a continuous and effective control over the administration (IV) whether public services are open to all those who have the requisite qualifications, and (V) whether the people have opportunity to participate as laymen in the activities of the Government

Tests of democracy and how far the German constitution conforms to them.

Judged by these tests, theoretically and on paper the German constitution is certainly of a democratic type The federal constitution as also the constitutions of the constituent States† lay down that the supreme power resides in the people thus placing them in the position of the final arbiters of their political destiny It is also provided in the constitutions both of the Reich and the States that they may be modified, altered and amended save in exceptional circumstances by the legislatures elected directly by the people There is the further provision that by resort to the initiative the people themselves may amend the constitutions and the laws made thereunder Again the representatives of the people in all branches of the administration are elected by universal equal, direct and secret suffrage of all German citizens men and women,

* H. J Laski Democracy in Crisis p 140

† For all practical purposes the constituent States no longer exist. Federalism seems to be dead as mutton in Germany The subject is dealt with at some length in the chapter entitled The Federation and Residuary Powers.

in accordance with the principles of proportional representation. These representatives are entitled to control the administration in a variety of ways They have, for example, power to select the administrators. In the local sub-divisions generally the representative body select the administrators for fixed terms subject, however, in certain cases, to the approval of the State authorities. The administrators are held responsible for their financial acts to the local representative bodies and control is exercised over them also by supervision of the superior State authorities. Inasmuch as the German constitution falls theoretically under the category of responsible government the tenure of the central executive, which assumes political leadership in the Reich, depends upon the confidence of the legislature. Moreover, it is provided in the constitution of the Reich that all citizens without distinction are eligible for public offices according to their qualifications and capacities. It is claimed that the German educational system "is now undergoing changes designed to give the utmost opportunity to all capable students in the way of direct preparation for public offices of various kinds."*

The lay public associated with Governmental activities.

Lastly, reference may be made to the provision for participation by the lay public in Governmental activities through popular representation in official Commissions and Committees of Enquiry, in the tax authorities and even in the Courts. "This appears to be," observe Blachly and Oatman, "one of the strongest and best features of the German administrative system." We think, however, that there is nothing particular or peculiar in this procedure distinguishing the German system from the systems prevalent in some other parts of the world In fact, this procedure is to be met with in all democracies and even in India, where government is practically run by a bureaucracy The real test is whether the final decisions taken by the executive authorities are influenced by non-official opinion represented in the Commissions or Committees of Enquiry In India such Commissions or Committees are sometimes looked upon as manoeuvres calculated to evade the issues which they were appointed to settle. Blachly

* Blachly and Oatman The Government and Administration of Germany, p 624.

and Oatman have not taken care to show to what extent the advice and assistance of men of affairs, experts in various fields, scholars and scientists, placed at the disposal of the Government in the course of the enquiries conducted by Joint Committees of officials and non-officials, are utilised by men in power in the actual working of the machinery in Germany

Extraordinary powers of the Executive.

The statutory provisions enumerated above should be examined in the light of the extraordinary powers vested in the executive and of recent political developments with which the world has been made familiar It may be stated at the very outset that the executive authorities in Germany have been invested with ordinance-making powers, an expression which in India has had rather unpleasant associations Article 48 of the German constitution authorises the President to issue legal ordinances It is not specifically stated in the law that he has the right to issue such ordinances but the power is implicit in the fact that the constitution authorises him to take all necessary measures to restore public safety and order and to set aside certain constitutional rights which could only be effected by an ordinance Article 48 lays down

> In the event of a State not fulfilling the duties imposed on it by the constitution or the laws of the Reich the President of the Reich may make use of the armed forces to compel it to do so
>
> Where public security and order are seriously disturbed or endangered within the Reich the President of the Reich may take the measures necessary for their restoration intervening in case of need with the help of armed forces For this purpose he is permitted for the time being to abrogate either wholly or partially the fundamental rights laid down in Articles 114 115 117 118 123 124 and 153
>
> The President of the Reich must without delay inform the Reichstag of any measures taken in accordance with paragraph 1 or 2 of this Article Such measures shall be abrogated upon the demand of the Reichstag
>
> Where there is danger in delay the State Government may take provisional measures of the kind indicated in Para 2 for its own territory Such measures shall be abrogated upon the demand of the President of the Reich or the Reichstag
>
> Details are to be determined by a law of the Reich.

The article may, broadly speaking, be divided into two parts. It refers, in the first place, to the power of the President of the Reich to have the Federal laws executed in the territories of the States technically called *Lander* The President has, subject to the safeguards specified in the article, absolute discretion in choosing his own line of action Should a *Land* fail or refuse to discharge its obligations imposed upon it under the constitution by the laws of the Reich the President may, in the exercise of his individual judgment, try to settle the issue by negotiations or by any other conciliatory method, or invoke, in the last resort, the aid of the armed forces to enforce his authority The power, as Dr. Ogg remarks, is similar to that exercised by President Lincoln during the stormy period of the American Civil War, but Lincoln used it against individuals in rebellion and not against States In fairness to Hitler one point should be taken note of It is by no means true that that power had not been employed except when Hitler rose to power In 1920 it had been used against Thuringia and Gotha and, three years later, against Saxony In each case the President suspended the State authorities and appointed in their stead a " national " Commissioner In pre-republican Germany the Emperor had power to take action against a " disaffected " State and force it to fulfil its " constitutional federal duties" but only with the assent of the *Bundesrat* The President is more kingly than the Emperor, the constitution does not require him to seek anybody's assent

The President *versus* the Emperor

Far more important in this connection is the second part of the article which defines the Presidential powers in extraordinary circumstances when the public safety and order in the Reich are considerably disturbed or endangered Under it the President's position is stronger in some respects than that accorded to the Emperor While, for instance, the latter could declare martial law in any part of the Federal territory when public security was in danger and adopt emergency measures when the Parliament was not in session, submitting them, however, for approval, to that body at the earliest opportunity, the Weimar constitution has given the President power to have recourse to emergency powers regardless of whether the Parliament was sitting or not;

and there is nothing to suggest that the President s measures would lapse like those of the Emperor on account of lack of formal assent of the legislature, although he is required to report his action

It is true that the Reichstag can in law demand execution of the measures, but the fact that only on two occasions the Reichstag asserted itself coupled with the incidents that followed almost immediately renders that safeguard as of doubtful value The President revoked the two emergency decrees at the instance of the Reichstag but later dissolved that body and reissued the ordinances and the Federal Supreme Court upheld on appeal the legality and constitutionality of the whole procedure Yet there were certain safeguards against resort to dictatorial powers under the constitution The language of the article would show that the rights of the people guaranteed under the law could be suspended only for a specific object namely, that of restoring public safety and order and evidently for nothing else It was laid down that they could be suspended *for a temporary period and only as an emergency measure* The President was further required to report his action to the Reichstag without delay which action was liable to be withdrawn at the request of that body Again by implication if not expressly, he was not authorised to act beyond the limits of the constitutional instrument inasmuch as power was derived from the constitution itself The question now is whether the spirit of the constitution has been maintained by Herr Hitler and whether he has not assumed powers which were not intended to be conferred upon the President or the Chancellor

Safeguards against dictatorial powers.

In exercise of the powers conferred upon him President Hindenburg issued a decree in the beginning of March 1933, suspending certain important clauses of the constitution The step taken was drastic and a frontal attack on the communistic activities in Germany The rise to power of Hitler is a measure of the communist s failure The immediate cause of this anti-communist drive by the Hitler administration is to be found in the suspicion on its part that underground activities had been carried on by foreign ' undesirables for the

purpose of overthrowing the constitution The burning of the Reichstag was pointed out by the German General as being the external symptom of those anti-German underground activities In haste and in panic the Government inaugurated a policy of terrorisation They carried out mass arrests, banned the communistic Press and suspended the most cherished clauses of the constitution.

Constitutional guarantees in the German constitution, and how and where they may be abrogated

The articles, which are mentioned in Sec 48 and which have been abrogated, relate to the inviolability of personal liberty and of residence, of the secrecy of correspondence and of the postal, telegraph and telephone services, freedom of expression and opinion, the right of peaceful assembly, the right of association and the right of property It appears that the whole charter of fundamental rights embodied in the German constitution has been placed at the complete mercy of the executive authorities Nor is the drastic action taken merely theoretical Measures have been taken in accordance with the decree to terrorise the communists, particularly the Jews, and it is a scandal that a thinker like Einstein had to leave Germany to seek refuge abroad and that his bank money in Germany was forfeited * It is perfectly true that in cases of grave emergency, the President is justified in issuing a decree suspending the constitution But the point is whether such an emergency actually arose when the decree was issued It seems to us that the situation did not justify or call for an executive action of this kind and that it has been resorted to in violation of the spirit of the constitution Originally the decrees were promulgated for the purpose of dealing with public disorder

* Herr Hitler gives his impressions of the Jews in his book called *Mein Kampf* The Jewish doctrine of Marxism," observes Hitler, "rejects the aristocratic principle in nature and in place of the eternal privilege of force and strength sets up the mass and deadweight of numbers It thus denies the value of the individual among men, combats the importance of nationality and race, thereby depriving humanity of the whole meaning of its existence and *kultur* Thus did I now believe that I must act in the sense of the Almighty Creator by fighting against the Jews I am doing the Lord's work The Jew was never a nomad, but was ever a parasite in the bodies of other nations" To these impressions and his declaration that he is "a fanatical anti-Semite" may be traced Herr Hitler's anti-Jewish drive.

As soon as it was brought under control, it was thought that Article 48 would remain only "as a gun behind the door," and in 1929 there was no decree at all but by September, 1932, the list was formidable, the total number of decrees being 233 What is significant is that the power contemplated under the article in question came to be used not so much in connection with the maintenance of law and order as with economic and financial issues, both of major and minor importance such as the sales abroad of Reichmarks the revolution tax payments in terms of gold, the suspension of reparation payments in kind, etc

Conflicts of theory and practice.

Germany is rapidly moving towards dictatorship, if it is not already in action Parliamentary democracy has been reduced to a myth and no one s life and property are secure now The German case is proof positive of the fact that however extensive the rights of the people may be as stated in the constitution, the charter guaranteeing those rights may be reduced to complete nullity in actual operation The Weimar constitution has been jockeyed with the deliberate object of making the executive the final and irresponsible arbiters of the political destiny of the German citizens It is true that Art 48 makes it essential that any Presidential decree must have the sanction of the Reichstag But the protection has proved ineffective It is likely to prove ineffective in all modern responsible democracies Freedom of speech freedom of the Press and other concomitant rights formed the main plank in the nineteenth century Liberal platform in Europe, but the expansion of human endeavours in the twentieth and the resultant conflicts of interests have exposed the inherent limitations of the doctrine It is not surprising that the democracies under modern conditions particularly the post-War democracies should have betrayed considerable reluctance to adjust the Liberal theory to modern practice

Provisions for administrative Ordinances

Apart from the Presidential decrees contemplated in Article 48 the National Cabinet individual members thereof, the Chancellor the Reichsrat, the State Cabinets and special *ad hoc* authorities in Germany have power, subject to certain

restrictions, to issue legal ordinances, under which the rights of the people may be held in abeyance Besides, there are ample provisions for the issuing of administrative ordinances which have been classified into (1) organizational, (2) instructional, (3) institutional, and (4) executory * It is to be admitted, however, that the German Constitution has laid down in detail legal remedies, available to the citizens, against all ordinances and orders of the administrative authorities which affect their rights Mention may be made in this connection of the Administrative Courts and the ordinary Judicial Courts which are empowered to examine into the validity of ordinances or decrees But it must be remembered that in Prussia *per se* the constitution cannot be attacked by a private individual except by way of protest against an order issued under it which seeks to compel the individual Nor can the question of expediency be raised save by informal procedure and in the lower instances of the administrative tribunals The use of the ordinance to establish legal norms which are enforceable as law has been demonstratively proved in Germany to be both efficient and effective, and sometimes extremely harmful to the rights of the individual and inimical to his interests

The protection of minorities in Russia

In Russia the problem of the protection of minorities has been complicated by the exclusion from citizenship of a large number of people who have been enumerated in Art. 65 of the constitution For one thing, to deprive people of their franchise purely on economic or religious grounds not only strikes at the foundations of democracy but runs counter to the principles of minorities protection evolved under the League of Nations Secondly, the judicial competence has been vested in the All-Russian Central Executive Committee so that there is no Court to which appeal may be preferred by citizens for any action taken by the executive The Executive not only carries on the administration but sits in judgment on its own acts.

* Blachly and Oatman The Government and Administration of Germany, pp 615.

It is the supreme legislative, administrative and controlling body of the Russian Soviet Republic Articles 32, 33, 34, 35 36 define in some detail the functions of that Committee and we find in Art 77 that it is the final court of appeal

The Soviet Republic in law and in fact is an oligarchy * The fact that the vote of one townsman is considered equivalent to that of five peasants goes to show that the Republic is administered in the interests of the urban population and not so much in those of the rural areas The urban population accounts for only about one tenth of the total inhabitants of Russia The Congresses of Soviets are composed of representatives of town Soviets and of County Congresses in the case of the latter in the proportion of one deputy for every 25,000 inhabitants, and in the case of the former, in the proportion of one deputy for every 5 000 electors, with a maximum of 500 deputies for the whole region (Art 53) † Although at the present moment the Russian Government is rather oligarchical than dictatorial in form, it cannot be

* For the Russians claim that the U S S R. is essentially a democratic community and that it is in fact the most completely democratic of all the communities of any magnitude in the world of to-day read Sidney Webb s thought-provoking article in *Current History* entitled Is Soviet Russia a democracy? Far reaching constitutional changes homologated in 1936 indicate an interesting phase in the development of the Russian communist doctrine. Franchise is thrown open to persons over eighteen years of age regardless of social origin or former employment The supreme legislature will consist of two Houses—the Soviet of the United Republics and the Soviet of the Nationalities. It will be elected *for four years* unless earlier dissolved in the case of disagreement as regards important legislation The elections of the Chambers and the President will be by secret ballot All restrictions on civil rights are abolished. In reviewing the changes at some length in the *Manchester Guardian* of the 22nd June, 1936 Professor Laski observes that the government of a class is being transformed into the government of a community that each one of the changes is an immense advance over past technique " and that it represents a real approach to the classic principles of representative government. Social rights guaranteed to the citizen include rest work education, racial and sexual equality and religious freedom. Their protection rests first on the elected legislature and secondly on the judges who in the Courts of appeal are elected *for five years* by the legislature to whom alone they are responsible. Little room is left for executive discretion and the system of government stands midway as Professor Laski points out, between the systems of Great Britain and the United States of America. In the intervals between sessions of the legislature it is to be represented by a Joint Committee of 37 members of both Houses with power to declare war and conclude peace issue emergency ordinances and declare executive acts *ultra vires* in its capacity as the Supreme Court of the Republic. The constitution may be amended not by simple legislation but by a two-thirds majority of both chambers of the legislature.

† *Of* the recent constitutional changes indicated above in the footnote.

denied that the Constitution contains dictatorial elements, especially because the Government are not responsible for their acts to any Assembly elected upon a democratic basis; and "the tendency is for all effective power to be concentrated in ever fewer hands so that a pure dictatorship may well be only a question of time " *

The Russian application of law

An idea of the actual operation of the law in Russia may be obtained from the sentences of punishment that are usually awarded by the Russian Courts for apparently trivial offences Some time ago a demonstrative four days' trial of " Cook-wreckers " was concluded in Moscow with the passing of death sentences on five of the accused and sentences of imprisonment for terms ranging from eight years downwards on seven others The case arose out of a report in the Soviet Press which described the conditions of industrial kitchens as intolerable and filthy and the food served in eating rooms for industrial workers in Moscow as uneatable Prosecution witnesses swore that soups and other dishes regularly contained quantities of rubbish, nails, sand, hair, glass and other deleterious substances The Court declared it to have been definitely proved with a promptitude worthy of a better cause and with an air of judicial detachment and impartiality that the accused cooks and their instigators had deliberately mixed these substances with the food " for the purpose of discrediting the Soviet Government and undermining the State industry " Even if the substance of the allegations be true, it would be impossible to conceive of a more brutal punishment for such offences and a more atrocious travesty of a judicial trial It is believed in international circles that the unfortunate men were apparently scapegoats singled out as they were as victims of Soviet wrath on account of their non-proletarian birth That view is supported by the fact that the chief prisoner was Mikhail Oskin, formerly a village grocer who had received the Cross of St George four times for valour during the War Such recognition by the Czarist Government was weighty evidence against him and in support of the prosecution case It may be added that two of his sons were also among the victims

* Charles Petrie The History of Government, p 179

This brings us to the very well known Moscow trial of certain employees of a British Engineering Company engaged in business in Russia called the Metropolitan Vickers Company

The Metropolitan Vickers case.

The trial caused sensation throughout the world The employees of the Vickers, *viz* , Monkhouse Thornton Cushny and Macdonald, who had been arrested by the Russian Government on the alleged *ground of sabotage of a power station*, were British subjects Monkhouse and Thornton were dining when the Russian police placed them under *arrest, searched the premises and re*-moved certain documents Cushny and Macdonald were arrested a few hours later at the former s flat and a number of documents again were seized Immediately the news of their arrest provoked a storm of protest in England and as a result in April, 1933 His Majesty s Government introduced a Bill into the House of Commons seeking power to prohibit importation of Soviet goods Sir John Simon made a fighting speech in the Commons on the Bill and in the course of that speech pointed out that Russia *had* bought power plants from Messrs Metropolitan Vickers extensively during the last ten years and that the Company had received the highest praise from Soviet engineers The Company supplied some of their best and most skilful men for the purpose of installing, starting and running the plants Sir John did not dispute the sovereign authority of any Government to deal with persons residing within their jurisdiction but suggested that the allegations on which the arrests had been effected were not sustainable Panic in the British mind was caused also by the *fact that the* O G P U police who arrested these four British subjects and put them in jail custody had in another case and in the same prison not merely sentenced 35 Russians to death but carried out the sentences then and there without, as far as known, any trial and certainly without any ordinary judicial proceedings In the meantime the British Ambassador told the Soviet Minister that if the Russian Government wished to continue friendly relations they must refuse to be drawn by the police ' into trumped up frivolous and fantastic accusations against a friendly *and* reputable *British Company* The Soviet reply stated that it had been found on investigation that a series

of unexpected breakdowns at the electrical stations in Moscow were the result of wrecking activities of criminal elements whose object was to destroy electric stations and to put out the operation of factories dependent upon them The Soviet Government added that investigation proved active participation in the work of sabotage by certain employees of the Metropolitan Vickers That answer did not convince the British Government and the House of Commons passed the Bill by a substantial majority

The firing squad in Russia

Fantastic speculations were made regarding the nature and terms of punishment for the arrested persons In fact, however, those speculations proved to be false and a lenient view was taken of the alleged offence by the Russian Court and the sentences imposed were not of a grave nature It is difficult to say whether the Russian Court in awarding light sentences of punishment was influenced by its regard for the principles of justice or by British threats The opinion is widely held in Great Britain that had not Parliament made a definite and uncompromising stand as manifested in the Anti-Russian Bill, the verdict of the Court and the final decision of the Russian Government would have been different If their view be correct, the conclusion becomes irresistible that in Russia there is a serious and constant menace to the life, liberty and property of aliens as well as of citizens should they be found to hold views contrary to the communist doctrine or be suspected by the Russian authorities of anti-communist bias This seems to find support in rather brutal punishment meted out by the O G P U. police to 35 Russians referred to in Sir John's speech made in the House of Commons on April 5, 1933, and in what has been called the firing squad of the 25th August, 1936, resulting in the death of sixteen persons condemned by the Military Collegium of the Supreme Court at Moscow In the latter case the condemned persons' pathetic appeal for mercy was rejected by the Presidium of the Central Executive Committee *

* Commenting on the tragic episode M Trotsky described it as 'one of the greatest crimes in history " He added that " apparently they (the accused) have been sentenced to death despite the promise they certainly got from the Ogpu that their lives would be spared if they pleaded guilty "

Text-book writers on law and practice

It appears, therefore, that the world has not been reassured by Vyshinsky's remark "We do not want blood and vengeance." That might have been true in the case of the Vickers employees but the policy of the Russian Government, the methods pursued to execute that policy and the farcical nature of some of the Court proceedings all tend to suggest that the fundamental rights stated in the constitution and guaranteed to the citizens are more apparent than real. This view is supported by the Riga correspondent of the London *Times* who had in his paper published a quotation from a book entitled *Courts and Justice in the U S S R* by N V Krylenko, Commissar of Justice of the R S F S R, which sets out the law and practice in the following words

> Every judge must keep himself well informed on questions of State policy and remember that his judicial decisions in particular cases are intended to promote just the prevailing policy of the ruling class and nothing else

An official text-book used by the Law students of the Moscow University entitled *The Basis of Class Justice*, contains the following remark which throws a lurid light on the system of administration of justice in Russia

> Soviet law does not recognise the principle that all persons are equal in the eye of the law All decrees of the Soviet Government and all the Soviet laws have from the beginning taken great care to insist on a strict class line It would be very naive to afford equality of justice to the toiler and the class enemy This would be contrary to the policy of the Soviet Government

Law is politics

But there is another side of the picture which cannot be ignored by careful students of law and administration All that we learn from the quotations cited above is that the law in Russia is framed and administered with a view to promote the policy of the State and therefore of the party which dominates it But is that an extraordinary phenomenon? Is it against legal traditions and practices in other civilized countries particularly in the places like England where in text-books and political discussions one

frequently hears of the Rule of Law, of complete equality in the eye of law, of the principles of justice and equity and good conscience and of such other pompous and pleasing phrases? Professor Laski's answer is decisively in the negative The "Soviet system of Law," he observes, "does what the English system does it puts the supreme coercive power of the State behind the fundamental premises of the regime of which it is the expression "* Similarly when in a celebrated case in 1778 Chief Justice Chase of the Supreme Court of the United States laid down that a law "cannot change innocence into guilt or punish innocence as a crime, or violate the rights of an antecedent lawful private contract, or the right of private property," he had obviously in mind the philosophy of the American Constitution, the meaning and significance of its structure and the institutional basis of law and justice "Law," said Lenin, "is a political measure, law is politics" Any judge or jurist may repeat Lenin's maxim, in England, America, France and in all the civilized countries, not to speak of Hitler's Germany and Mussolini's Italy and the Indian Civil Servant's British India One cannot deny that behind the accepted legal doctrine is its relentless purpose, sometimes avowed and open and sometimes silent and subtle, of consolidating the authority of men and women in power It is as true of East and West as it is of Soviet Russia which is both East and West

The threefold object of the Moscow doctrine

In Russia of course, as Professor Laski points out, "in every phase of law, property, contract, tort, crime, its end is the three fold one of crushing counter-revolutionary resistance, of freeing the workers from the impact of what are regarded as capitalist habits, and of building up a social outlook able to work the principles of Communist society "† The end is capitalistic where the community concerned is captalistic Where as in Russia to-day, or in England during the War, or in India in the throes of a politico-racial conflict, the atmosphere is tense, the law is avowedly drastic and its application and interpretation cal-

* Harold J Laski Law and Justice in Soviet Russia, p 39
† *Ibid*, p 39.

lous and cruel But the point is whether under a given system there are opportunities placed at the disposal of the common populace to have easy access to the courts and defend their cause at small expense and seek to have the legal *principle related to social* environment

Professor Laski assures us that according to this test the Russian system compares favourably with *what is prevalent in most European* countries and in the United States It lacks the form, dignity *and procedural rigour associated with the administration of justice* in England, but the system, it is emphasised, has features which tend to bring *law more substantially into relation with justice* than anything the Common Law system has so far been able to attain * Certain facts have been mentioned in support of Professor Laski s thesis The litigant, for example, pays fees in proportion to his means The Consultation Bureau usually appoints on application from the litigant a lawyer to assist him In some cases the litigant himself selects his counsel from the collegium and the average lawyer is paid about as much as a skilled workman There is something like a judicial dyarchy a lay judge sitting with a professional judge The former lays stress on social needs in the light of the facts of the case while the latter provides the technique of law The object of punishment is reform The responsibility for crime is, in ultimate analysis attributed to society The prisoner is allowed, as far as possible, a full and self respecting life He is employed in industrial work and paid for it He has the right to vacation, receives a generous allowance of visits and writes and receives letters practically without limit and without any censorship There is no restriction on freedom to smoke while working or in conversation with his fellow prisoners There is also autonomy behind what in British India we have learnt to call the prison bar All *punishments* in prison are in the hands of the prisoners themselves They have their *newspapers through* which they ventilate their grievances and give expression to a good deal of their energetic

Crime is a social evil.

* Harold J Laski Law and Justice in Soviet Russia p. 10

resentment No wonder that men with long records of convictions have become successful engineers, lawyers, civil servants and business organizers Some have joined the Red Army and the Communist party It is, in short, the task of social healing to which the judiciary in Russia seems to be pledged Punishment is preventive and reformative rather than deterrent

The rule of social conduct

But we cannot get away from the simple fact that there is little or no tolerance in the political and economic issues It may be true that if it is difficult for a counter-revolutionary to establish his innocence in Russia, it is equally difficult for a communist to prove his innocence in British, European and American Courts of Justice The analogy is a statement of the problem and in no sense its solution We have not yet reached a stage when we can definitely point to a particular doctrine as being the only salutary and unexceptional rule of social conduct National sovereignty has been given a long and earnest trial, and it has failed It has produced disorders and conflicts culminating in a terrible orgy of human bloodshed It has led to a ruthless suppression of small and weak racial, linguistic and religious groups Is it not therefore time to try another method for the purposes of conciliation and co-operation? The League of Nations has not yet been fully used, nor have its possibilities been exhausted We do not suggest that a federation of nations can all of a sudden make angels of men or that a World Court can convert this perverse world into a paradise But if two men, other things being equal, are more dependable than one man, an assembly of nations is likely to prove, in like circumstances, a more effective instrument of justice and peace than one powerful and self-conscious nation The problem of minorities protection, like many economic issues, has become a world problem, and it is not perhaps safe to leave it completely and absolutely in the hands of a national State, especially when democracy is struggling in vain to assert itself

The need for international control in respect of minorities protection

Now, it may be remembered that none of the States which form the subject-matter of our study in this chapter is bound by international obligations as contemplated in the Minorities Guarantee Treaties. Besides, some of them have no official connection

with the League of Nations It has been shown that safeguards for the protection of minorities guaranteed under Municipal law are liable to be violated by executive authorities unless they have cultivated a spirit of accommodation and friendliness We recognise that in Russia at present there is no acute conflict between nationalities but there is no guarantee that it will never arise Admittedly there is suppression of opinion when that opinion is opposed to the communist doctrine What is now predominantly an economic and social issue may, with the changes in the personnel of the Government and in the circumstances, take a different hue for once the principle of coercion of individual life by the State has been accepted, there can be no limit to its application elsewhere Hence it is that in the League Guarantee Treaties stress has been laid on the statement of fundamental rights as being an essential and vital part of the instrument of minorities protection * It is being increasingly felt that in the present temper of nations, particularly in Europe where the conflicts of nationality are frequent as a result of post-War political reconstruction, some kind of international control is essential for abiding peace and the welfare of mankind Where Municipal law fails to give necessary protection international guarantees should intervene and in that view of the case it is time pressure was brought on those States which have not joined the League as well as on those which are not bound by international guarantees, to submit themselves to international supervision and control in regard to minorities protection like the Succession States of Europe The future of a stable and healthy social order seems to lie in that course and perhaps in no other If persuasion fails there should be no hesitation to appeal to physical or economic pressure

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* The Secretary of the Interior in U S A. said in a public speech in May 1936 that President Roosevelt was convinced that so long as the minorities were deprived of the liberty of thought and religion and the right to a normal civilised life there could be no permanent understanding between the nations

CHAPTER IX

SAFEGUARDS IN THE DOMINIONS

The position in the Dominions

It is worth while to turn our attention to the solution of the minorities problem sought to be effected in different parts of the self-governing Dominions of the British Commonwealth of Nations It will be recalled that at a meeting of the All-Parties' Convention held at Calcutta in December, 1928, Mr M. A Jinnah referred to the law and practice prevalent in the Dominion of Canada with regard to safeguards for the protection of minorities there He pointed out that "the minorities are always afraid of majorities The majorities are apt to be tyrannical and oppressive and particularly religious majorities, and minorities therefore have a right to be absolutely secured" Was, Mr Jinnah asked, the adjustment between the French Canadians and the British arrived at on the basis of population or on the ground of pure equity? Was the adjustment between the Copts, Christians and Mussalmans in Egypt regulated by such considerations? The answer suggested by Mr. Jinnah probably was that apart from the specific provisions of law, custom had grown up in the Dominion of Canada of securing representation of different sects and communities not only in the legislature but in the executive Government. On the specific issues involved Mr Jinnah's contention was not challenged either by Sir Tej Bahadur Sapru or by Mr M R Jayakar, both of whom spoke on his amendments to the Nehru Report, most of which were lost.* Mr Jinnah is not the only person who emphasised such a point of view, for another eminent Mahomedan scholar and publicist, Dr. Shaffat Ahmed Khan, who seems to have studied the problem in

* The proceedings of the All-Parties' National Convention, pp 78-96.

some of its details, has drawn a similar inference In his note of dissent appended to the report of the Simon Committee of the United Provinces Legislative Council, we are given, for instance, a short history of the relations between the communities in Canada and of racial conflicts in the Union of South Africa and of the measures that have been adopted in both the countries to safeguard the interests of their minorities

The history of racial conflicts in Canada

It is well known that in Canada apart from the large number of *Indians* and aboriginal inhabitants, there are strong English and French elements in the population The history of the problem in that Dominion is to be found in speeches made in Parliament and the discussions that followed ultimately leading to the passing of the *Quebec Act* in North America * Originally the bulk of the inhabitants of Quebec were either French from old France or native Canadians There were then about 90 000 Frenchmen as against 600 natives from Great Britain and Ireland They were of opposite religions ignorant of each other s language and inclined in their affections to different systems of laws † The French insisted not only upon the liberty of public worship but demanded a share in the administration of justice and the right in common with the English people of being admitted to all offices under the Government The English on the other hand pointed out that the laws of England were valid against the Papists in Canada and that unless the latter thought it proper to turn Protestants they must be excluded from all public offices and various branches of power In support, the English quoted a portion of the Governor s Commission which laid down that no person should sit and vote in the Assembly of Freeholders unless he had accepted the declaration against Popery prescribed by Statute 25 Car 2 The French relied upon the Treaty of Peace concluded between the British Government and the French authorities according to which the King of England guaranteed protection to the Catholic religion professed by the inhabitants of Canada in so far as the laws of Great

* 14 George III c. 83.

† Baron Maseres afterwards Attorney-General of Quebec; A. B. Keith: Speeches and Documents on Colonial Policy Vol. I p 12.

Britain permitted The relevant terms of the agreement were as follows.

> "His Britannic Majesty on his side agrees to grant the liberty of the Catholic religion to the inhabitants of Canada, he will consequently give the most effectual orders that his new Roman Catholic subjects may profess the worship their religion, according to the rites of the Romish Church, as far as the laws of Great Britain permit"

The French case was weak, particularly in view of the insertion of the clause "as far as the laws of Great Britain permit," which rendered the whole stipulation in favour of toleration very doubtful, for it was contended that the laws of England did not at all permit the profession of the Catholic religion The French case was further weakened by Statute I Elizabeth, which enacted that no foreign Prince, person, prelate, etc, spiritual or temporal, should at any time exercise power of jurisdiction, spiritual or ecclesiastical, within the United Kingdom or any part of the British Dominions Again Cap II of the same Statute provided that every Minister of a parish church in Great Britain and different parts of the British Dominions must use the Book of Common Prayer and "no other service without paying or incurring certain heavy penalties" By that Statute, further, the Catholic mass was prohibited in the whole British Empire, including the province of Quebec

The Quebec Act and its provisions

This controversy was followed up by the Quebec Act of 1774,* which conferred upon the inhabitants of Quebec the right to profess the Romish religion, subject to the King's supremacy as by Act I Eliz It also abolished the oath of Elizabeth and in its place a new oath was promulgated to which persons professing the Romish religion had to swear allegiance before the Governor It was further provided in the Act that no ordinance touching religion should be valid and have effect until the same received the approbation of the Crown That Act was in

* 14 George III, c. 83

effect a repudiation for the first time in the history of the Empire of the European methods of spiritual tyranny which culminated in the evolution of the German doctrine of *Kultur* The British Government stood committed under its provisions to tolerance of non British cultural institutions in an Overseas Colony, a policy seeking as it did to draw a line of demarcation between the things of Caesar and the things that are spiritual and sacred *

Protection clauses in the British North America Act 1867

We now come to the British North America Act of 1867 Protection for the racial, linguistic and religious minorities has been provided in sections 93 and 133 of that Act In section 93 we find detailed provisions for education It is stated that in and for each province the legislature may exclusively make laws with reference to education subject to the following conditions

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union

(2) All the powers privileges and duties at the Union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen s Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen s Protestant and Roman Catholic subjects in Quebec

(3) Where in any province a system of separate or dissentient school exists by law at the Union or is thereafter established by the legislature of the province an appeal shall lie to the Governor General in Council from any Act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen s subjects in relation to education

(4) In case any such provincial law as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section is not made or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper provincial Authority in that behalf, then and in every such

* A. Zimmern: The Third British Empire pp. 167-92.

case, as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under this section "

Rights of minorities in respect of schools

It appears from this section that the law reserves to the Governor-General in Council power to override the decisions or acts of any provincial legislature relating to education which, in his opinion, are repugnant to the spirit of the constitution The rights and privileges with respect to denominational schools which might have existed at the time of the Union are to be scrupulously observed; the powers and privileges conferred on several schools in Upper Canada are extended to the dissentient schools in Quebec An appeal shall lie to the Governor-General in Council from any act passed by any Provincial Government seeking to affect prejudicially the rights and privileges enjoyed either by the Protestant minority in Quebec or the Roman Catholic minority in other parts of Canada This section was, however, amplified in 1886 The Governor-General in Council has as a result now power to refer questions of law or fact to the Supreme Court for hearing or consideration. The relevant portion of the amended law reads as follows *

"(1) Important questions of law or of fact touching provincial legislation or the appellate jurisdiction as to educational matters vested in the Governor in Council by the British North America Act, 1867, or by any other Act or law may be referred by the Governor in Council† to the Supreme Court for hearing or consideration .

(2) The Court shall certify to the Governor-General in Council for his information, its opinion on questions referred to with reasons therefor, which shall be given in like manner as in the case of a judgment upon an appeal to the said Court. . "

The actual position of the minorities in this regard should, however, be considered in the light of the well-known Manitoba

* See Sec 4 Repealing Sec 37, Capital 135, Revised Statutes, 1886, Professor G M Wrong The Federation of Canada

† The expression "Governor" shall, as respects Canada and India mean the Governor-General, and include any person who for the time being has the powers of the Governor-General (*Cf* subsection 6 of Sec 18 of 52 & 53 Vict , c 63).

legislation of 1890 and the serious conflict which arose in Ontario on the language issue during the war period In Manitoba the local legislature established non sectarian schools in 1890 and imposed taxation on all for the benefit of those schools It should be noted that prior to this, denominational schools had been in existence which were paid for by the parents or guardians concerned The legality of the Manitoba legislation was called in question by the religious minority and the issue was raised before the Court of law In *City of Winnipeg* v *Barett** the Court decided in 1892 that the Act passed by Manitoba two years earlier was perfectly valid It held that the only right existing before it was for parents or guardians to provide money for the maintenance of denominational schools, if they desired and that that right was not abrogated by the Act in question although under it they had now to provide for unsectarian schools also In *Brophy* v *Attorney General of Manitoba*† the Court ruled that the Governor General in Council could be appealed to in the case of any conflict with law An appeal was actually made to the Dominion Government to ask Manitoba to amend its legislation involving as it did an injustice to the minority Manitoba refused to listen to the Dominion Government and the result was the introduction into the Federal Parliament of a remedial Bill The Bill was opposed by many of the Protestant supporters of the Government and could not be placed on the statute-book The issue was raised at the general election in which the Conservatives were routed An agreement was at last arrived at largely through the persuasive efforts of Sir W Laurier, which permitted denominational teaching out of the ordinary class hours in the public schools ‡

Provisions for modified denominationalism in educational institutions.

The constitutions, which were granted in 1905 to Saskatchewan and Alberta imposed on them the obligation of providing modified denominationalism in educational institutions but this, as Professor Keith has pointed out, cost Sir W Laurier the allegiance of one of his able lieutenants and has left a legacy of

* A. C. 445 (1892)
† A. C. 202 (1895)
‡ Keith: The Constitutional Law of the British Dominions p 335

troubles The question was again raised in 1926 when it was proposed to transfer to the two provinces school lands so long retained under the control of the Federal Government, and the principles adopted in 1905 in regard to modified denominationalism have been reiterated and given effect under the subsequent surrender of school lands * In 1930-31 Saskatchewan decided to abolish the use of religious emblems in the common schools and to insist that English alone must be the medium of instruction This decision has given rise to a considerable amount of bitterness of feeling and has been denounced as having inflicted a grievous wrong on the French Canadians But there seems to be little doubt that it is valid in law

In Ontario the Roman Catholic School Trustees attempted to frustrate the efforts made for the purpose of securing effective teaching of English in schools with the result that the local legislature superseded by law the Trustees by the establishment of a Commission In *Ottawa Separate Schools Trustees* v *Ottawa Corporation*† the Privy Council ruled, however, that the Commission was illegal on the ground that the Roman Catholics were entitled to control the management of schools But it was held also that French had no claim to be treated as a medium of instruction or as a subject for study save in so far as the law provided In another case, namely, *Ottawa Roman Catholic Separate Schools Trustees* v *Quebec Bank* the ruling of the Court was that "the sums expended by the Commission when in office could legally be made a charge on the funds provided for the education of Roman Catholics "‡ It appears now that, on the one hand, Ontario has relaxed her efforts to make effective knowledge of English compulsory and that, on the other hand, there is an ever-increasing recognition by the Roman Catholics that such knowledge on the part of the French children is not only desirable but essential But the Roman Catholics have not ceased demanding for themselves control of secondary education and of the funds allocated to them In 1928 the Privy Council ruled§ that they were not entitled to

* The surrender took place in 1930

† A C, 76 (1917)

‡ Keith The Constitutional Law of the British Dominions, p 334

§ Roman Catholic Separate Schools Trustees *v* V R (A C, 363, 1928)

any right which they had not enjoyed in 1867, but that they could appeal to the Governor General in Council for relief, if necessary Professor Keith thinks that the Manitoba case which showed that the local legislature was not afraid of flouting the Federal Government is a sufficient warning which the Governor-General in Council is not likely to ignore

In 1903 the Quebec Legislature treated Jews as Protestants* and the result was that in 1924 the Jews demanded representation on the Protestant Board for Montreal and the appointment of Jewish teachers in the schools The subject was raised before the Privy Council which held that the proper and legal course would be to make separate provision for them At present the interests of the Jewish minority have been safeguarded by separate provision for them in respect of educational institutions All these cases show that the jurisdiction of the Governor General in Council as an appellate authority from Provincial decisions in matters having bearing *on the question of minorities protection in regard* to language is being practically ousted It is significant that such an eminent authority as Professor Keith welcomes this tendency in actual operation

The judicial interpretation of the educational rights

The Governor General's ultimate power or Federal control regarding these matters yet stands in law but the process of appeal and adjudication may now be influenced if not wholly determined by a judicial verdict inasmuch as the Governor-General in Council is empowered to refer the controversial matter to the Supreme Court in the first instance There is, therefore, little room for arbitrary decisions and the possibility of the interests of the minorities being ignored or neglected has been minimised to a considerable extent † But *it must* be *borne in mind that the accretion of power to* the Provinces *vis-a-vis* the Federal authorities does not necessarily imply effective protection for minority rights it may mean less protection in certain cases The real safeguard lies in the substitution of judicial control for executive justice

* Hirsch v Montreal Protestant School Commissioners (A. C. 200 1928)

† The answers given in a *reference to the Court* are *though advisory to be deemed* liable to appeal. By Sec. 213 of the India Act of 1935 the Governor-General is given power to seek in his discretion advisory opinion of the Federal Court on questions of law

In section 133 we find that either the English or the French language may be used by any person in debates in the Parliament of Canada and on the floor of the legislature of Quebec. Both these languages are by law required to be used in their records and the journals of the Houses of the legislature. Either of these languages may be used by any person in pleading or process in or issuing from any court of law in Canada and in or from any of the courts in Quebec. The Acts of the Parliament of Canada and of the legislature of Quebec are printed and published in both the languages. The interests of the linguistic minorities are thus safeguarded under clear provisions of the statute. But this law did not come all at once, for the Act of 1840 uniting the Canadas made English the official language of all formal instruments and reports of Parliament, copies in the French language being excluded from the archives. The debates in Parliament could be conducted by individual persons in French and the privilege was quickly availed of. A year later an Act was passed authorising French translation of the Acts and regulations. The matter, however, came to a crisis in 1845 when the Speaker refused to admit a motion in French.* While upholding the ruling from the Chair the legislature demanded the repeal of this provision of the Imperial Act which was ultimately secured in 1848. It ought to be remembered in this connection that the crisis had occurred before Canada was raised by the Act of 1867 to the status of a self-governing Dominion.

Safeguards in regard to languages

Much has been said of sections 51 and 52 in which provision has been made for the representation of four provinces in the Parliament of Canada. Quebec, which is more or less a French

of public importance. It is somewhat analogous to the power possessed by the Privy Council. It seems from the language of the section that the opinions thus offered in open Court may not be binding. It leaves, however, room for growth and development of conventions. It is further to be noted that recommendations by the Privy Council under sec. 4 of the Judicial Committee Act, 1833, must be unanimous while the Indian Federal Court procedure permits of dissenting opinions on the Hague International Court analogy. The United States does not provide for such advisory opinion of the Supreme Court and in Australia the Court does not accept the offering of advisory opinion as part of its judicial function. In Northern Ireland the advisory opinions of the Privy Council have binding effect.

* Keith, Responsible Government in the Dominions, Vol. I, p. 376.

colony, has been given a fixed number of 65 seats and the other provinces have each such a number of members as bears a proportion to the total population as the number 65 bears to the total population of Quebec The number of members of the House of Commons may be increased from time to time by the Parliament of Canada provided the proportionate representation of the provinces is not disturbed The inference is sometimes drawn from this statutory provision that the French or the English have something like separate racial representation in the legislature of Canada thereby providing some sort of protection for the racial and religious minorities Of course in Canada administrative divisions correspond generally to the divisions of the population on a racial basis, especially in the case of Quebec and Ontario But the constitutional arrangements that have been made determining the share of representation of each in the Federal legislature are perhaps inevitable in every Federal Government subject to modifications to suit particular circumstances of each case There is, therefore no reason to suppose that the minorities enjoy in Canada such racial or religious representation as is suggested by the system of communal vote separate electorate and communal representation in the legislature which constitute an important if not the most important plank in the Muslim political platform in India

Representation in the legislature the claims of Provinces recognised.

Then again it is well known that included in the powers assigned to the provinces are matters relating to property and civil rights, and solemnisation of marriage, and incorporation of Companies for provincial objects * But so far as Ontario Nova Scotia and Brunswick are concerned, the Federal Government have power with the assent of the provincial legislatures concerned to establish uniformity of civil law under section 94 of the Act Action under that power has, however never been taken, and there is great doubt if this power will ever be exercised, although there is proof of concurrent legislation regarding these matters in all the provinces † Closely connected with sec 94 is

* Sec. 92 (11 12 13)

† Keith; The Constitutional Law of the Dominions pp 323-21.

sec 97 which lays down that until the laws relating to property, civil rights and the procedure of the courts in these three provinces are made uniform, the judges of the Provincial Courts concerned appointed by the Governor-General shall be selected from their respective Bars There is no such qualifying clause with regard to the composition of the Courts in Quebec which is predominantly French, for it is laid down in sec 98 that the Judges of the Courts of Quebec shall be selected from the Bar of that province. The issues involved are Federal issues and do not appear to be strictly relevant to the question of minorities protection, except perhaps in the case of Quebec

Representation of minorities in the Cabinet, the principle on which it is based

There is a certain amount of confusion hanging over the question of representation of minorities in the Canadian Cabinet Both Mr Jinnah and Dr Shaffat Ahmed Khan have stated what at best may be called a mere convention to support their demand for statutory provision for the admission of Mussalmans to the Governor-General's Cabinet and those of the Governors in the Indian provinces Generally the discretion of a Dominion Prime Minister in respect of his choice of colleagues is subject to the same principles which prevail in Great Britain. He has, however, to placate the different sections of his followers, and in the federations and the Union, to consider " the claims to office of several parts of the country, a fact which often makes for weak Ministries "* In the case of the Labour Ministries of Australia, the choice of Ministers is made by the Parliamentary caucus, and the Prime Minister has no option but to accept colleagues practically thrust on him. With the exception of the first Commonwealth Ministry of Mr Watson, this has been the usual practice † The caucus has begun to have its say in the selection of the Prime Minister himself Professor Keith thinks that although " at first sight it seems as if this were an invasion of the rights of the Governor to make his own choice, the matter can be and has been managed constitutionally,"‡ for the

* Keith Responsible Government in the Dominions, Vol I, p 232
† *Ibid*, pp 232 33
‡ *Ibid*, pp 238-39.

formal appointment continues to be made by him on the analogy of the English law or usage but contrary to the Irish system But we have yet to learn that religious or racial differences *are the main determining factors* as far as the composition of the Dominion Ministries is concerned It is true that in the Dominion of Canada the principle of representation of each part thereof in the Federal Government has been generally recognised and regularly applied Thus the first Ministry of thirteen members in 1867 comprised 5 from Ontario, 4 from Quebec (one representing the English population) and two each from Nova Scotia and New Brunswick The problem is now more difficult, for the increase in the number of provinces renders it less easy to satisfy claims what is essential is that Ontario Quebec the Maritime provinces and the West should all be made to feel that these are not being passed over *

Implications of the custom relating to the composition of the Cabinet

It is clear that in the first place there is no statutory provision for racial representation as such in the Cabinet, although the Federal machinery dividing as it does the entire Dominion into autonomous provinces has sought to safeguard at the centre the interests of both English speaking Ontario and French speaking Quebec In the second place the composition and personnel of the Cabinet are not determined by statute but by what is called convention and there is a great deal of difference between the two in countries which are governed by written constitutions In this connection the essential fact is to be remembered that Canada enjoys Parliamentary government of the British pattern in which the Cabinet is responsible to the legislature and removable by it It means that although the Prime Minister as a general rule considers the claims of the various provinces and communities in forming his Cabinet or in advising the Governor-General in that behalf, he is ordinarily bound by the political necessity *that his* colleagues should subscribe to the fundamental principle and

* Keith Responsible Government in the Dominions Vol. I pp 139-80.

creed of his party So it cannot be said, as Mr Jinnah and Dr Khan seem to suggest, that considerations of racial representation always outweigh political or party obligations

"A strange and fortuitous Noah's Ark"

It should, however, be noted that the Canadian system of responsible government is not the exact reproduction of the Westminster model and the reason is that in certain respects conditions materially differ Canada, unlike the United Kingdom, is a federation and as a federal by-product the Dominion executive is usually formed as far as possible on a recognition of the claims of its constituent units It has, besides, experienced many a religious and racial conflict the like of which one has not witnessed in recent years in the United Kingdom, and as a result the French Canadians, the Anglo-Saxons and the Roman Catholics have more or less established claims to representation in the Federal Cabinet which "has," as Professor W P M Kennedy puts, "become since 1867 a reflection of provincial or territorial, religious and racial grouping"* Professor Kennedy goes further and observes "A Prime Minister (in the Dominion) may find himself forced to choose a colleague because he is the sole supporter of his party in some province or group of provinces, although his claim to Cabinet office is merely the uniqueness of his position He may find himself forced to select some one on account of his race or religion who brings to the Council Chamber neither executive experience nor political wisdom, neither national outlook nor the capacity for it A federal Cabinet may thus become a strange and fortuitous Noah's Ark"† But Canada affords an example of federalising the Cabinet rather than of communalising it, and that is why it has achieved the high average of success at which Professor Kennedy seems to be amazed

Canada has no power to alter its constitution

There is another point to which reference from the point of view of the protection of minorities seems to be called for Canada has no power to amend its Constitution Act without legislation by the Parliament of the United Kingdom That no such power

*Kennedy: Essays in Constitutional Law, p 100
† *Ibid*

was given to Canadian agencies is easily understood and this is to be explained by the fact that Canada was the first Dominion Federation, and also by the special conditions prevalent there at the time Even the Statute of Westminster passed in 1931 has not altered the position of the Canadian Dominion in regard to this matter It is laid down that 'Nothing in this Act shall be deemed to apply to the repeal amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder * This provision is justly considered *to be a safeguard against* possible oppression of the minorities by the majority community The legal supremacy of the British Parliament remains, but the safeguard embodied in the Statute is really designed to ensure effectively accordance with the requests and consent both of the Dominion and of provincial Parliaments † The actual method of change is left in the hands of the Canadian legislatures, the Imperial authorities having power, by necessary intendment, only to ratify and endorse Dominion legislation ‡

The racial problem in South Africa.

The racial problem in South Africa has been in no way less serious and less acute than in the Dominion of Canada In addition to the native races and the large mass of coloured populations from India and other parts of Asia, the two principal communities inhabiting the Union are the English and the Dutch Always claiming special rights and privileges and distracted by mutual jealousies the latter two communities have gone through a series of

* Section 7 (1) of the Statute of Westminster 1931 Those Acts are the British North America Act of 1867 (c. 3) [the principal Act] the Act of 1871 (c. 28) respecting the establishment of provinces in the Dominion of Canada the Act of 1886 (c. 35) as to the representation in the Canadian Parliament of territories not forming for the time being part of any province but forming part of the Dominion the British North America Act 1915 (c. 45) increasing the number of the Canadian Senators the British North America Act 1916 (c. 19) extending the duration of the Parliament of Canada (repealed); and the British North America Act 1930 (c. 26) confirming certain agreements (scheduled to the Act) which were made between the Dominion of Canada and Manitoba British Columbia Alberta and Saskatchewan. (Robert P Mahaffy: The Statute of Westminster 1931, pp 12-13.)

† K. C Wheare The Statute of Westminster 1931, p 93.

‡ Compare the *section finally adopted with the clause proposed by the* 1929 Conference. (O.D.L. Report paragraph 66; and Canadian H. C Debates Vol. III, 1931 pp. 3191-92.)

protracted struggles with each other The problem has not yet been solved completely and to the entire satisfaction of the races concerned But the Union of South Africa Act of 1909 has provided for certain safeguards which have removed, to a considerable extent, the probable causes of friction

It is laid down in section 137 of the Act that both the English and Dutch languages should be used as the official languages of the Union and be treated on a base of equality.* All records, journals and proceedings of Parliament must be kept in Dutch and English, and all Bills, Acts and notices of general public importance and interest issued by the Government must be in both the languages This provision was not accepted by the English delegates without considerable reluctance, and they interpreted it as being an abject surrender to what they regarded as the unjust demands of the Dutch Professor Keith points out that the Dutch language has always enjoyed a fair amount of consideration but no equality of status with English In the Transvaal and Orange River Colony it had not quite attained the status of equality while in Natal it had no recognition whatsoever The provision was unreal from the practical point of view inasmuch as the customary spoken language of the Boers was not Dutch but Afrikaans The Act specially mentions Dutch as the literary speech of Netherlands, but it was claimed in 1925 that the language to be used as Dutch was really Afrikaans The officials speaking the Dutch language got an undue advantage over those speaking the English language because knowledge of English on the part of a Dutch official is, from the cultural point of view, more useful than the learning of Afrikaans on the part of an English official When he assumed the reins of government General Hertzog claimed for the Dutch language under the constitution a position not of equality but of predominance The Prime Minister's ambition was nullified by his successor, General Botha, who succeeded in arriving at a compromise † The proposal to make Dutch compulsory was modi-

Safeguards in regard to languages

* For the demerits of bilingualism *cf* Parliamentary Papers, cd 5666, pp 244 ff

† Parliamentary Papers, cd 6001, pp 81, 86 ff

fied and the provinces agreed in return to take steps to promote and popularise the use and study of the Dutch language Up to the fourth standard a child was to be taught and instructed in the language spoken at home and the parent was given the right to ask for his child s learning through the medium of the other language After the fourth standard both the languages were to be used as media of instruction unless the parents objected to that procedure Where there were enough pupils, separate classes had to be arranged for Teachers were expected to pass examinations in both the languages with a higher standard in one, but it was clearly stated at the same time that the teachers then in service would not be removed from office or in any way penalised by reason of lack of knowledge of one or the other language on their part, provided they were otherwise competent So far as the Dutch language is concerned it is generally held that it means both the Dutch and the Afrikaans languages There was a good deal of agitation and discussion over the official recognition of Afrikaans Records however are there to show that that dialect has been in the past and is now used for Hansard and answers to University questions Doubt that was entertained as regards the meaning of Dutch has been removed by the Official Languages of the Union Act No 8 of 1925 which provides that the word Dutch in sec 137 of the Union Act of 1909 and elsewhere shall include Afrikaans * In the preamble to the Status of the Union Act, 1934 it is enunciated that the Statute of Westminster, in so far as its provisions are applicable to South Africa, and an Afrikaans version thereof shall be adopted as an Act of the Parliament of the Union Similar provisions are made in the Union Constitution Act of 1935 †

Official papers and documents published in English and Dutch.

Then there is section 91 according to which the administrator is called upon to cause two fair copies of each ordinance promulgated by him and assented to by the Governor-General in Council, one being in English and other in Dutch to be enrolled

* Sec I

† The definition in the amending legislation of 1925 is not strictly accurate in view of the fact that Africaans which is derived from Dutch differs greatly from the parent language in grammatical construction, pronunciation and spelling High Dutch as it is called is hardly used in South Africa at the present moment

on record in the office of the Registrar of the Appellate Division of the Supreme Court of South Africa. The Governor-General has to sign only one of the copies, and in the case of conflict between the two copies deposited, that signed by the Governor-General shall prevail Section 145 provides that the services of persons in public employment of any of the colonies shall not be dispensed with by reason of their want of knowledge of either Dutch or English Nor can dismissals take place under the law when any such officers are transferred from one place to another * Dr Nathan complains that the lack of knowledge of native languages is the usual and marked defect of the South African public service which is recruited on a very low standard † As a result the efficiency of administration suffers greatly, particularly because of the existence of two places of Government, *viz* , administration at Pretoria and legislation at Capetown

Ireland as the centre of political and religious turmoils Irish resentment against partition

Ireland has for centuries been the centre of political and religious turmoils While Northern Ireland is mostly inhabited by the Protestants, those residing in the South belong to the Roman Catholic Church In addition to this, there was also the language difficulty inasmuch as Southern Ireland claimed to use its own dialect in business and legal and administrative affairs The problem has to some extent been solved by dividing Ireland into two parts and constituting Southern Ireland into a Dominion enjoying practically independent and sovereign status The partition of Ireland, however, has not satisfied a considerable section of the Irish people, and that is clear from what O'Brien writes on the subject "He (Mr Lloyd George) would have understood the Irish aversion to partition," observes O'Brien, "as he would have died on the slopes of shadow Snowden rather than submit, had the since Disestablished Church of Wales (a minority proportionately more considerable than that of Unionist Ulster in Ireland) proposed by way of compromise to cut off his own high-spirited little country into provinces of church-goers and chapel-goers at eternal enmity "‡ On his assumption of the Govern-

* Keith Responsible Government in the Dominions, Vol II, p 732
† Nathan South African Commonwealth, pp 149 52, 357 ff
‡ O'Brien The Irish Revolution and How it came about, p 437

ment of the Irish Free State President de Valera has also expressed his anxiety to see that the two Irelands are once again united In the course of his speech in the Dail Mr Cosgrave while President of the Free State said

> It is not generally understood by the man in the street that had the Northerners elected to remain with us they would have been guaranteed in perpetuity every acre of territory that for the moment is under their control They would have retained their Parliament of the six counties and their separate judiciary and their Governor according to their pleasure and would have had under the constitution of the Free State a representation of fifty-one members in the Free State Parliament instead of thirteen members who now represent them at Westminster *

For the time being the partition of Ireland looks more or less a settled fact We shall not discuss the position of Ulster because it still continues to owe legal political and constitutional allegiance to the British Parliament and is not therefore a separate political entity save in the restricted spheres of autonomy But it is necessary to examine in some detail those provisions in the Irish Free State which have the effect of safeguarding the interests and rights of the different classes of its citizens At the very outset reference is to be made to the fact that while there is in the articles of the Treaty between Great Britain and Ireland a distinct provision for safeguards for minorities in Northern Ireland there is no such provision made for the Protestant minority in the South † It does not however mean that there are no statutory safeguards for the Protestants in the Free State

Both Irish and English languages recognised officially

The Irish constitution makes by Article 4 the Irish language the national language of the State It lays down at the same time that English shall be equally recognised as the official language The Parliament of the State is given power to make

* O'Brien: The Irish Revolution and How it came about p 430

† The Anglo-Irish Treaty 1921 Art. 15 There is provision for joint consultation in Art. 5 of the amending Treaty of 1925 between the Governments of the Irish Free State and of Northern Ireland as regards matters of common interest

necessary and special provisions for districts or areas in which only one language is in general use. Further, Article 12 enjoins upon the clerk or any officer, as the Dail Eireann may appoint for the purpose, the duty of causing two copies of any laws passed to be made, one being in the Irish language and the other in English One of these copies is required to be signed by the representative of the Crown In the case of conflict between the two copies so prepared that signed by the representative of the Crown should be held to be valid It may be remembered that a similar provision has been made in the Union of South Africa; and it does not mean and has never been intended to mean that the Governor-General should always sign the English version of the law The trouble, however, arose in South Africa in 1911 as a result of the wrong assumption that the Governor-General would always sign the English version *

Ireland departs from the British and Dominion practices and incorporates fundamental rights in the constitution

The Irish Free State has made a departure from the normal rule observed in Britain and in other Dominions in that the fundamental rights of the people of the State have been stated and incorporated in the constitution on the Continental model Irish politicians have all along been convinced by the fact that the protection of civil and political rights is not possible unless certain essential principles underlying the rights of citizenship were guaranteed in statute and properly and adequately enforced in courts It is not to be inferred that the British subjects in Great Britain do not enjoy those rights or that the inhabitants of the Dominions have been deprived of them altogether In an earlier chapter we have referred to the rule of law under which personal liberty of the English citizen has been safeguarded No British citizen, for example, can be made to suffer in body or goods except for a distinct breach of law administered by an ordinary court in its ordinary jurisdiction Besides, there are other safeguards provided in the Magna Carta, the Bill of Rights, the Petition of Right and the law of Habeas Corpus Those statutory safeguards have been supplemented by

* Walker Lord de Villiers, pp 406, 478

a long series of judicial decisions which the executive or the police cannot violate or abrogate with impunity except in emergencies and in accordance with law The self governing Dominions have adopted practically all those safeguards which have the force of long-established usage and convention In South Africa, for instance, the security of personal freedom is provided by what is known as the writ *de homine libero exhibendo* analogous to the English writ of *habeas corpus* It is derived from the principles of Roman Dutch law But that law required that detention against which relief might be effectively sought, must be made *dolo malo* (with wrongful intent) The present practice based as it is on the principle of English *habeas corpus* has ruled out wrongful intent so that the writ is effective against detention which is wrongful or unjustifiable As a result the Roman Dutch term has fallen into disuse The writ applies to citizens and foreigners alike without distinction of race creed or colour In cases where a prisoner lawfully arrested is kept in detention for an excessive period the discharge is secured under the Criminal Procedure and Evidence Act, 1917 * With the exception of Ireland the nearest approach, as Professor Keith observes, to recognition of the principle of a definition of rights is the declaration that the Commonwealth (Australia) may not establish a religion nor interfere with the exercise of religion nor impose a religious test for employment under the Commonwealth

Now under Article 6 of the Irish Constitution the liberty of the person is treated as inviolable and no one can be deprived of his liberty except in accordance with law Again upon complaint made by or on behalf of any person that he is being detained illegally, the High Court or any and every judge thereof shall forthwith enquire into the complaint and issue an order requiring the authorities, to whose custody such person has been committed to produce the body of the person so detained before such court or judge without delay and to certify in writing as to the cause of detention The High Court or any judge thereof shall thereupon order the release of such person unless satisfied that he is being de-

* Likul Yu v Superintendent of Labour (1916) T S 181

tained in accordance with law * The question of interpretation involved in the clause "in accordance with law" is not without difficulty However formal it may appear, there is little doubt that it is intended to prohibit executive or legislative interference with personal freedom, and *prima facie* any legislation (in Ireland there has been a plethora of such legislation both under Cosgrave and de Valera) which sanctions such interference in effect amounts to an amendment of the constitution and would suggest the adoption of that special procedure required in all constitutional amendments

The issue was raised before the Court when it was urged with considerable force that the Public Safety Act of 1924 contravened the constitutional guarantees and was *ultra vires* inasmuch as the special procedure for constitutional amendments had not been applied in putting the Act on the statute-book Lord Chief Justice Moloney† quoted with approval the judgment of the House of Lords in *The King* v *Halliday* in connection with the 1914 Defence of Realm Act in which it had been held that the Act in no way infringed upon the Habeas Corpus Acts as it had become part of the law of the land, and expressed the view that similarly the Irish Act of 1924 left the constitution unaffected as it was covered by the expression "in accordance with law" as used in Article 6 The decision ignored the distinction between the British constitution which is of a flexible type and the Irish constitution which is rigid In the United Kingdom Parliament in law is omnipotent while in the Free State as in most written constitutions the sovereignty of the legislature has been deliberately restricted Mr Justice Pim held, however, that although the article in question gave the Irish legislature power to alter the criminal law of the country, there was force in the argument that a permanent law empowering the executive to deprive citizens of personal liberty without trial would be contrary to the

Is deprivation of personal liberty without trial contrary to the constitution?

* Sometimes the law passed in this connection may have drastic provisions as is proved by the Act for the preservation of public safety passed in 1926 and also by a similar Act adopted in 1932 immediately before the fall of the Cosgrave Government

† The King (O'Connell) v The Military Governor of Hare Park Camp (1924 2 I R 104)

spirit of the constitution Mr Justice Pim s view seems to have been recognised in section 3 of the Public Safety Act, 1927 The sponsors of the measure pleaded excuse for the ordinary procedure to which they had recourse on the ground that it was of an exceptional and temporary character * In 1931 the constitutional amendment procedure was applied in the enactment of the Public Safety Act promulgated in October, a tardy recognition of the sanctity of constitutional guarantees

The doctrine of *ultra vires* examined in courts.

It is interesting to call attention to certain important High Court decisions on the point In *The King (Edward O Reilly)* v *Attorney General of the Irish Free State*† it was held that the provisions of the Courts of Justice Act, 1926, did not repeal, merely by implication the rights protected in the Habeas Corpus Act In *O Boyle and Rodgers* v *The Attorney General and the Commissioner of the Civic Guard*‡ the Court ruled that Article 6 does not exclude jurisdiction to grant an injunction in an appropriate case if for instance it were sought to arrest a person illegally and remove him out of the jurisdiction before he could apply for a writ of *habeas corpus* A contrary view appears to have been taken in *The State (Kennedy)* v *Little*§ in so far as it was decided that the Fugitive Offenders Act 1881, was of effect and in full force in the Free State by virtue of Article 73, and that the Act did not abrogate the constitutional provisions The court decisions even where they protect the citizen, are practically of academic importance in view of the power vested in the legislature to amend the constitution by simple legislation for a prescribed period The decision of the majority of the Irish Court as regards the validity of the Constitution Act (Amendment No 17) and of the tribunals set up under it has been challenged in certain quarters That Act could be declared *ultra vires* only on the theory that the Act of 1929 which extended to sixteen years the power of constitutional amendments by simple legislation without a referendum, was itself invalid But as Professor Keith argues,‖

* Dail Debates Vol. 20 Col, 1159
† I R. 83 (1928)
‡ I. R. 558 (1929)
§ I. R. 39 (1931)
‖ Keith Letters on Imperial Relations etc. p. 157

Article 50 which sets out the procedure of amendments for eight years provided no protection for itself which, by implication and by constitutional usage in the Empire, was liable to alteration The article therefore was hardly any effective safeguard, and it appears that the Act of 1931 was perfectly in order

Article 7 guarantees the inviolability of private dwellings which cannot be forcibly entered except according to the due process of the law * It is provided under Article 70 that extraordinary courts shall not be established save only military tribunals authorised by law to deal with military offenders against military law The jurisdiction of such military tribunals shall not be extended or exercised except in times of war or armed rebellion and for acts committed during such times No such jurisdiction shall be valid in any area in which civil courts are open and are capable of being held, and no person shall be removed from one area to another for the purpose of creating such military jurisdiction † No person shall be tried on a criminal charge except with a jury, save for minor crimes and military offences Under Art 8 freedom of conscience and free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen No law can be made either directly or indirectly to endow any religion or prohibit or restrict free exercise of religion or give any preference or to impose any disability on account of religious beliefs and status or affect prejudicially the right of any child to attend school receiving public money without attending religious instruction at school, or make any discrimination in respect of State aid between schools under the management of different denominations or divert from any religious denomination or any educational institution any of its property save for roads, railways, lighting, water or drainage works or other works of public utility and on payment of compensation ‡ According to Article 9, citizens are

The nature and extent of fundamental rights

* Select Constitutions of the World, p 2 Compare the interpretation put upon the "due process" clause in the American constitution by U S A Courts dealt with in Chapter VIII, *supra*

† Keith Responsible Government in the Dominions, Vol I, p 320

‡ *Cf* Art 16 of the Irish Treaty, 1921.

guaranteed, for purposes not opposed to public morality, the right of free expression of opinion as well as the right to assemble at meetings and to form associations and unions. Laws regulating the manner in which such rights may be exercised shall contemplate no religious or political or class distinction. Article 10 confers on all citizens of the Irish Free State irrespective of their language or religious persuasion, the right to free elementary education. In order to secure fair and equitable representation of all classes of the people in the legislature it has been provided in Article 26 that members shall be elected on the principle of proportional representation.

It is necessary to examine how and to what extent the safeguards enumerated in the Constitution are real and to what extent they are not so. The real value of a Constitutional charter of personal freedom lies in ultimate analysis not so much in its legal enforceability as in its general use as an instrument of education for the people for all such safeguards are not susceptible to judicial treatment. In ordinary circumstances the charter serves as a warning to an executive anxious to arrogate to itself powers which do not according to the spirit of the Constitution belong to it and at least some of the rights guaranteed in the Constitution are enforceable in courts of law.

The constitution subject to alteration by simple legislation.

In Ireland all these rights are subject to the ordinary legislation of the State and the Constitution may be altered by simple Acts. The law relating to Constitutional amendments has been stated thus in Article 50 of the Constitution

> Amendments of this Constitution within the terms of the Scheduled Treaty may be made by the Oireachtas but no such amendment passed by both Houses of the Oireachtas after the expiration of a period of eight years from the date of the coming into operation of this Constitution shall become law unless the same shall after it has been passed or deemed to have been passed by the said two Houses of the Oireachtas have been submitted to a Referendum of the people and unless a majority of the voters on the register shall have recorded their votes on such Referendum and either the votes of a majority of the voters on the register or two thirds of the votes recorded shall have been cast in favour of such amendment. *Any such amendment may be made within the said*

period of eight years by way or ordinary legislation and as such shall be subject to the provisions of Article 47 thereof "*

Although the law quoted above shows that special procedure has been provided for amendment of the Constitution on the expiry of eight years after its coming into force, it is clear that for the eight intervening years the Free State Parliament was given plenary powers to alter it according to its pleasure and will The alteration of the Constitution by ordinary legislation was permitted for the first eight years as an experimental measure But this power was hedged in by a safeguard contained in Article 47, according to which, a Bill deemed to have been passed might be suspended for ninety days on the written demand of two-fifths of the members of the Dail or of a majority of the members of the Upper House Such Bill was also subject to a referendum if demanded by three-fifths of the members of the Senate or a twentieth of the voters on the register within ninety days after its passage But there is an exception under the same article in the case of " money Bills or such Bills as shall be declared by both Houses to be necessary for the immediate preservation of the public peace, health or safety " The safeguard has proved illusory by reason of this proviso An Act was passed under it in 1928 (Act No 8 of 1928) repealing the Article and leaving the legislature free to alter the Constitution by simple legislation In 1929 another Act was passed (Act 16 of 1929) which altered Article 50 and extended the period of freedom of constitutional change by ordinary method to sixteen years with the result that the constitution has now become elastic for all practical purposes †

* The italics are ours

† A large number of amendments have been passed under the article The first series embodied changes of a more or less technical nature The fifth amendment (No 13 of 1927) abolished the mandatory character of the institution of extern Ministers The next series altered the mode of composition and the machinery of election of the Upper House The tenth amendment (No 8 of 1928) abolished Initiative and Referendum Then followed another series which sought to increase to some extent the constitutional powers of the Senate and provide for one member of the Executive Council being taken from it The next amendment (No 10 of 1929) extended the period of constitutional amendments by a further term of eight years Notice has already been taken of the Public Safety Act of 1931 The Senate has been abolished, and opportunity has been taken by Mr de Valera of King Edward VIII's abdication not only to do away with the farcical office of the

Wide terms of the Public Safety Acts

It is well known that in fact the liberty of the person, the inviolability of domicile, the freedom to assemble and express opinions and form associations which constitute the fundamental and most cherished rights of the citizen, have been invaded by simple legislation, particularly by the Public Safety Act of 1927 and by an Act to amend the Constitution passed in 1931 to meet the danger arising from the Irish Republican Army But the Public Safety Act of 1927 ceased to operate in 1928 and the Act of 1931 was suspended by President de Valera s Government * The legislation of 1931 created military tribunals *with power even to enhance penalties provided by law* and destroy appeal, authorised the administration to ban public associations deemed hostile to it and to make its membership a criminal offence and threw in certain cases the onus of establishing their innocence on the accused persons† and suppressed the opposition Press Those drastic measures resulted in refusals of the accused to recognise the courts and their rather drastic punishment ‡

Military Tribunals and their jurisdiction.

Apart from ordinary legislation seeking to invade the Constitution the terms used in the Constitution itself are significant It is true that the right of the liberty of person is inviolable and *cannot be affected or abridged except in accordance with law* and that the High Court or any judge is entitled to examine on *habeas corpus* any violation of liberty But it is laid down at the same time that nothing in this Article contained shall be invoked to

Governor-General but to eliminate the Crown from any concern with the internal affairs of the Free State an Act which is criticised in certain quarters as being a complete negation of the fundamental basis of the Treaty of 1921. It is however significant that contrary to the view taken by the Supreme Court in State (Ryan and others) v Lennon and others (1935 I R. 170) the Privy Council held in Moore v Attorney-General for Irish Free State (1935 A. C 484) that the Irish legislature is no longer bound by the constitution.

Mr de Valera invoked the Public Safety Act in August, 1933 for the purpose of banning Blackshirt processions.

† Compare the provisions of sec. 36 of the Bengal Suppression of Terrorist Outrages Act 1932 which has made possession of certain literature an offence. The guilt is presumed as soon as possession is established and the onus of proving innocence lies on the accused.

‡ Keith ; The Constitutional Law of the Dominions pp. 383-84

prohibit, control or interfere with any act of the military forces of the Irish Free State during the existence of a state of war or armed rebellion "* This proviso is to be read with the jurisdiction of military tribunals provided for in Art 70 In a number of cases in 1921 and 1923 the Irish courts felt that it was for them and them alone to decide at what point they would cease to function and allow Martial Law Courts to act This view was circumvented by legislation in 1923 But the Martial Law Courts are actually an executive machinery to combat rebellious action against the State Decisions delivered by such tribunals, however, have no judicial effect As a result, the persons taking part in them are liable both civilly and criminally, if their deeds exceed the limits necessary for the suppression of disorder In Great Britain the issue as regards liability of public servants has not been fully and finally decided in view of the fact that the usual procedure is to obtain an Act of Indemnity

Restrictions on civil rights in the Dominions

In the Dominions, generally, it has been a tendency to make by law inroads on popular rights and to strengthen the provisions as against treason, sedition and similar offences They have in many cases adopted the British legislation of 1920 to confer emergency powers on the executive to deal with difficult situations In New Zealand much public indignation was caused in 1932 by the action of the Government not only in copying the British Act but in omitting the safeguarding clauses against the right to impose compulsory work on the public and to introduce military conscription In South Africa the recent limitations on civil rights are connected with the determination to deal with the growth and development of native unrest In 1914 an Act was passed conferring extensive powers on magistrates to prohibit public meetings In 1930 the provisions of the Act of 1914 were felt insufficient by the Government and the Parliament empowered the Minister of Justice to forbid the holding of any meeting in any specified area for a definite period and to prevent any person from attending that meeting provided he had reasons to apprehend that hostility might be engendered

* Art 6

by any such meeting between European and non-European inhabitants. Further, the Governor General in Council has power to prohibit the dissemination of publications likely to cause racial bitterness, but there is provision for appeals to the court as to the question of whether any publication would naturally have such a result. In Australia a measure called the Crimes Act was passed in 1932 legalising deportation of members of unlawful associations declared so by the High Court or a State Supreme Court, their arrest without warrant and their exclusion from the rights of franchise. It may be noted, however, that the Commonwealth High Court declared the part of an earlier legislation, involving the deportation of persons on the absolute determination of a Minister not valid in law. All these measures in the Dominions tend to show that civil liberties of the people are not absolutely inviolable. This may be due to many causes but Professor Keith thinks that growing social unrest throughout the Dominions is increasing the difficulty of recognising them as widely as formerly.

The Free State states the law of citizenship and excludes British subjects in certain circumstances

Unlike the other Dominions, the Irish Free State has taken special care to state in its Constitution the law of citizenship.* Of course Canada and South Africa have evolved by local Acts of their respective legislatures local laws of citizenship in addition to the Imperial Acts passed from time to time. The constitutional position of the Free State in this regard is peculiar and interesting inasmuch as it has gone beyond the jurisdiction of the Imperial Parliament.† All inhabitants of Ireland who satisfy the conditions of the law of nationality which forms part of its Constitution are admitted to all the rights and privileges which have been enumerated above. The law of citizenship is embodied in Article 3 which states that every person without distinction of sect domiciled in the area covered by the Irish Free State at the time of the coming into operation of the present Constitution, who was born in Ireland or either of whose parents was born there or who has been ordinarily a resident there

* Further legislation on the subject has recently been promulgated by Mr de Valera's Government. It is dealt with at some length in Chapter XVII *infra*

† Keith The Sovereignty of the British Dominions pp 64-65

for not less than seven years, is a citizen of the Irish Free State and shall enjoy the privileges and be subject to the obligations of such citizenship This law has been qualified by a rider that any such person being a citizen of another State may elect not to accept Irish citizenship No discrimination in treatment based on religious, racial or other considerations, is permitted under the law, but it seems to be clear at the same time that no British subject as such is entitled to claim equality of status or similarity of treatment with an Irish citizen unless he has satisfied the conditions laid down in Article 3 as subsequently amended by the Irish Nationality and Status of Aliens Act, 1935

Safeguards in Australia equality of treatment assured to all religious sects

In Australia statutory safeguards against discrimination in favour of one class of citizens against another are not very many But there are one or two sections of the Commonwealth of Australia Act of 1900, which guarantee equality of treatment to all religious sects It is laid down in section 116 that the Commonwealth shall not make any law for the purpose of establishing any religion or imposing any religious observances or prohibiting the free exercise of any religion and that no religious test shall be required as a qualification for admission to any public office or public trust Sections 117 and 118 place all the States in the Commonwealth and their respective peoples on a footing of equality No subject of the Crown in any State shall be subject to any disability or discrimination which would not be equally applicable to him if he were a subject of the Crown resident in any other State Full faith and credit must be given throughout the Commonwealth to the laws, public Acts, records and judicial proceedings of each and every State So far as the House of Representatives is concerned, section 24 prescribes the number of members to be chosen in the several States and it is provided that representation shall be in proportion to the respective numbers of their people * The manner in which the number is to be determined is also defined and specified There is of course no law regulating the representation of the various States in the executive Government of the Commonwealth, but the usual practice is that efforts are made to secure for each State

* Select Constitutions of the World, p 364

one member of the Cabinet even if he be only an honorary Minister and not to have too many Ministers from one State * Professor Keith points out that this is an end in view but is not always attainable None of the provisions except those made in Section 116 are however, calculated and deliberately designed to secure safeguards for any particular community, sect or religious denomination as such

Influence of religion on education.

Some reference is necessary in this connection to the influence of religion on the educational policy in each of the self governing Dominions *In some of them the system of purely secular* education prevails —for instance, in New Zealand, South Africa and Victoria In South Africa schools are opened with prayer and readings from the Bible Subject to a conscience clause the teaching of the Bible history is permitted But there can be no doctrinal or sectarian instruction save in the Cape under conditions laid down in an Ordinance of 1921 In the Dominion of Canada separate schools have been provided for Roman Catholics and Protestants in Ontario Quebec and, to a modified extent, in Manitoba Much bitterness was caused by the prohibition in 1930 of the display of religious emblems in the ordinary schools in Saskatchewan In Quebec† a difficulty arose on account of the peculiar position in which the Protestants had been placed since 1903 They were required to admit Jews to a share in the control of the Protestant schools and to recognise the qualifications of Jewish teachers The validity of the Act of 1903 was questioned by the Quebec Court in 1924 which held that *Jews could not fairly and logically be included in the term Protestant* On reference on appeal the Supreme Court of Canada also refused to accept the position of Jews as Protestants and affirmed the legality of separate schools for them ‡ The Privy Council ruled that the legal course would be to provide separate arrangements for the Jewish minority In Australia the principle followed is that children must have some form of religious instruction unless their parents or guardians object to such

* Keith Responsible *Government in the Dominions* Vol. I p 912

† Canadian Annual Review 1923 1924-25 1925-26

‡ *Cf* Act 1925 c 45

instruction being given That principle has been accepted in New South Wales, in Queensland, in Tasmania and in Western Australia, but not in Victoria or in South Australia Denominational schools are maintained in Newfoundland * In Ireland no discriminatory treatment is permitted as between schools of different denominations as regards State aid, and every child has the right of attending Government-aided schools without attending any religious instruction Denominational education is, however, largely prevalent there

The influence of Church on political issues

Extremely important is the influence exercised by the church on political issues in the Dominions Generally, subsidies to churches have now been abandoned by Parliaments † Reference has already been made to section 116 of the Commonwealth of Australia Act under which the Commonwealth is forbidden to establish any religion or require a religious profession from a public servant and to interfere with the exercise of any religion,‡ and to Article 8 of the Constitution of the Irish Free State which has sought to establish the principle of religious equality In Quebec, however, the Church of Rome was confirmed in its privileges by the British Government in 1774 and was empowered to exact its dues from Catholics, though not from Protestants This position has been reaffirmed in all subsequent legislation and has made the Romish Church practically the Established Church of Quebec A considerable difficulty was caused during 1869-75 by the controversy over the right of a Catholic condemned for his religious opinion to secure burial in Roman Catholic cemetery In *Brown* v *Cure de Montreal* the Privy Council decided the issue in favour of the condemned Catholic A much greater confusion arose as a result of the unrest excited by the assumption by some Canadian judges that the Papal decree known as *Ne Temere* regarding forms of marriage automatically altered the State law

* Newfoundland has for the present ceased to enjoy what is widely known as Dominion status

† *Cf* the statutory provisions in India for the maintenance of Christian Church establishments dealt with in Chapter XVI, *infra*

‡ Professor Keith holds that these rules " are rather *pro forma* than of importance " (The Constitutional Law of the British Dominions, p 438)

of Quebec That assumption was negatived by the Privy Council in *Despatie* v *Themblay* in 1921 * This judgment is important inasmuch as it has provided a safeguard against Papal intervention in legal and political issues But yet there is no denying the fact that the church, to some extent, dominates Quebec life Mention may be made of an Act of 1898 which, to please and placate the Pope, restored curiously enough, to the Jesuits the property which had been confiscated on the conquest of Canada, although, as Professor Keith observes, any claim to it had long been extinguished either by the suppression of the Order by the Pope in 1773 or by the death of the last member of the Order in the Dominion in 1800 A very strong feeling was roused against that action But the Dominion Government refused to intervene in what it considered to be a purely domestic affair for Quebec

The doctrine of ecclesiastical immunity rejected.

The Church in Quebec has always pushed its claims to govern the politics of its adherents At the Charlevoix bye-election the Cures resorted to the crude method of spiritual and temporal intimidation It may be recalled that the election of Mr Langevin was contested in court on this score and that the latter held that an ecclesiastical person was not subject to the jurisdiction of a civil court without the sanction of a spiritual superior a principle unsound in theory and dangerous in practice But that view was rejected by the Supreme Court which negatived the doctrine of ecclesiastical immunity and of the superiority of the church to the constituted civil authority † In 1876 the Bonaventure election in Quebec was set aside by the court on the ground of spiritual intimidation to which those who voted for the Liberals were subjected Again in 1878 another election was held null and void on the same ground ‡ It is true that in recent years the church has shown a certain amount of moderation in its claims to allegiance of its adherents in civil and political matters and this is to be explained partly by the judicial decisions which have gone against them and partly by the efforts of the Pope to keep its activities within

* A. C 702

† Brassard v Langevin 1 S.C.R 145

‡ The election of Berthier

reasonable limits But there is no evidence that the control of the church over its followers has in any substantial measure been reduced in Quebec What is more important is that the French Canadian race looks forward to it constantly for inspiration and lead

The Privy Council as a protector of minority rights

The question of the abolition of appeal to the Privy Council from the Dominions has often been raised in connection with the protection of minorities The Imperial Conference of 1930 could not settle the issue by dropping the appeal altogether inasmuch as a vehement protest was recorded by the Protestant minority in Southern Ireland against any such action They expressed the view that the appeal was necessary to safeguard their rights in religious matters guaranteed in the constitution The Statute of Westminster, 1931, does not seem to have brought about any change, by any specific provision, in the position which had existed before it was passed The matter in the Irish Free State depended on the interpretation of the relevant terms of the Treaty and the question was whether the appeal could be dropped without breaking the Treaty But the issue has been clarified to some extent on the assumption by Mr de Valera of the Presidentship of the Free State He thinks that the Treaty is not binding upon the Irish Government, and in regard to the questions of the oath and land annuities he has shown no hesitation in putting his doctrine into operation *

The appeal has been abolished in Ireland.

Apart from President de Valera's action, the issue may be considered purely from the standpoint of law If Canada could abolish the appeal, it seems to be open to the Free State to act

* On the 6th of June, 1935, the Lord Chancellor delivered two judgments in the Privy Council the effect of which is that Canada has the right to abolish appeals to the Privy Council in criminal matters and that the Irish Free State has power, since the passing of the Statute of Westminster, to abolish the right of appeal to the Privy Council from the Southern Irish Courts Lord Sankey remarked that the simplest way of stating the position was to say that the Statute of Westminster gave the Free State power under which it could abrogate the Treaty and that, as a matter of law, it could avail itself of that power Lord Sankey's exposition of the law relating to the Free State is clear, but there seems to be no ground for confining the right in the case of Canada to criminal matters and thus drawing a line of distinction between that Dominion and the Free State in view of the equality of status between the two countries, unless reliance is placed on sec 7 of the Statute

likewise because it is laid down in Article 2 of the Articles of Agreement of the Treaty that the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada and the law practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada, shall govern their relationship to the Irish Free State Professor Keith suggested that instead of retaining the appeal in its Treaty form, so far as Ireland was concerned, it would be more useful for the minority if the Free State gave an undertaking to arbitrate before an Inter Imperial Tribunal any grievance of that minority which the British Government should think sufficiently important as to justify the suggestion that a breach of the Treaty of 1921 was involved * Professor Keith was in favour of restricting inter Imperial intervention only to specific points of dispute between the Free State and the Protestant minority in regard to the interpretation of the terms of the Treaty having bearing on the question of minorities protection The suggestion made is interesting, but the trouble is bound to arise in connection with the personnel and the terms of reference of the Tribunal proposed Ireland will not submit to British dictation in this matter Nor is there normal legal and constitutional warrant for British intervention unless it is willingly assented to by the Free State itself The Free State is competent under the Statute of Westminster despite the Treaty to remove all Imperial restrictions upon Dominion autonomy including the Privy Council Appeal The appeal was abolished by the Free State Government in 1933 by a purely Irish agency which received the Royal assent in November of that year †

Canada in relation to the Privy Council.

In Canada and Australia the existence of the federal system has introduced a certain measure of complication into the question If the Canadian provinces refuse to abolish the appeal and if the Federal machinery, on the contrary drops it the result would be confusion As Professor Keith points out if one issue were

* Keith. The Constitutional Law of the Dominions p 281.
† Constitution (Amendment No. 22) Act 1933 (No. 45 of 1933)

decided in one sense by the Supreme Court, nevertheless it could still be decided in the opposite sense by the Privy Council, and chaos would result, for the Supreme Court could not be compelled to accept the Council's view nor the Council that of the Supreme Court."* It seems that the provinces can abolish the appeal, but in order that such action may be effective all of them must acquiesce in it If the Privy Council appeals from the Canadian Supreme and Provincial Courts were based on the British North America Acts, 1867 to 1930, or any order or rule or regulation made thereunder, the Dominion and its constituent provinces would be rather helpless in the matter of repeal of the appeals. But inasmuch as they are governed by other Imperial Statutes (3 and 4 Will IV, c 41, 7 and 8 Victoria, c 69) the protection contemplated in sec 7 of the Statute of Westminster does not apply to the appeals Nor does the Royal prerogative to grant special leave constitute any safeguard, for a subsequent Act of Parliament controls the prerogative as has been laid down in *Attorney-General* v *De Keyser's Royal Hotel* We agree with Professor Kennedy that the appeal from the Provincial Courts is somewhat more complicated than that from the Federal Supreme Court † The Dominion is no longer restricted either by the doctrine of repugnancy or by that of territorial limitation But the provinces, although free from the repugnancy doctrine (sub-section 2 of sec 7 of the Statute), do not possess the power to make laws having extra-territorial operation It is, however, suggested that the lack of extra-territorial power would not prove a decisive objection to the abolition of appeal by the provinces ‡ Now, it is almost certain that Quebec which is suspicious of the English majority in the Dominion will not readily give its consent to such abolition, and this fact places the question of the abolition of appeal, except in the matter of criminal law, § outside the range of practical politics at any rate for the time being

* Keith The Constitutional Law of the British Dominions, p 280

† Essays in Constitutional Law, p 155

‡ K C Wheare The Statute of Westminster, 1931, p 95; Kennedy Essays in Constitutional Law, p 155

§ The Criminal Law, except the constitution of the Courts of Criminal Jurisdiction but including the procedure in criminal matters, is the concern of the Federal Government [*cf* sec 92 (27) of the British North America Act of 1867]

The position in Australia.

In Australia the position is more difficult and the general sentiment is more unfavourable to abolition* than in Canada, and this view is supported by the fact that the States have not been given the power so far to abolish the doctrine of Imperial repugnancy by repealing the Colonial Laws Validity Act in its application to them † But it is necessary to state the law as applicable to the Commonwealth Under sec 2 (when adopted) of the Statute of Westminster Australia could abolish the appeal in so far as it was provided for in an Imperial Act Even without that Statute the appeal may be destroyed by abolishing the reserve power by the ordinary method of constitutional amendment and then depriving the Judicial Committee of its existing power in relation to Australia by a Commonwealth Act It may also be abolished by a Commonwealth Bill to be reserved for His Majesty s pleasure to be taken thereon under the Commonwealth of Australia Act, 1900 and it is hoped not without sufficient reason, that the requisite assent of the Crown will be granted as a matter of course in accordance with constitutional usage

South Africa and the Council appeal.

The Union of South Africa Act 1909, limits the appeal only to cases from the appellate Division of the Supreme Court in which special leave is granted by the Judicial Committee (sec 106 of the 1909 Union Act and sec 9 of Act No 70 of 1934) The number of cases that have been brought before the Committee is comparatively small It is not surprising in view of the fact that the purpose underlying the arrangements has been to confine the appeal to conflicts involving international or Imperial issues The Union is competent to destroy it under sec 2 of the Statute and also in accordance with the procedure applicable to the Australian Commonwealth which has already been dealt with

* The position since 1907 has been that by a Commonwealth Act the State Supreme Courts are deprived of power to hear constitutional issues affecting the relations of the Commonwealth and the States or of the States *inter se* and the Federal High Court is the final interpreter of the constitution, although there is evidence to show that in recent years the tendency has been to follow the principles of construction laid down by the Privy Council.

† *Cf* sec. 2 read with secs. 8 and 9 of the Statute of Westminster

The Privy Council appeal has been defended on various grounds. As a symbol of Imperial unity, as a defender of the State rights as against the federal power and as an impartial and impersonal dispenser of justice the Committee has very often appealed to the imagination of the lawyers and the lay public throughout the Empire But those are considerations which we need not examine in this work One argument, however, which deserves more than a passing notice, is that it has ever been and is always a doughty champion of minority rights in those parts of the overseas Possessions and Dominions which have been so distinctly marked by strong religious, linguistic and racial differences.

Grounds for retention of the appeal

Attention may be drawn to a very interesting and illuminating article on the subject by F R. Scott in Queen's Quarterly (Autumn, 1931) * Mr Scott cites a series of cases in which the Privy Council and the Canadian Supreme Court have pronounced judgments contemporaneously upon Canadian law for sixty-five years, in order to ascertain which of the two judicial bodies has shown greater regard for the rights of minorities. The analysis is by no means an attempt to read motive into the decisions of a particular judge or a court but is only a statement of the fact. The first case of importance arose out of the Common School Act of 1871 which created non-sectarian schools in New Brunswick. The Catholics opposed the Act on the ground that they were deprived of a customary right which had been accorded to them in respect of Parish schools, which, though avowedly of an undenominational type, had been allowed to assume a Catholic character in those districts where the Catholics were in the majority. The Provincial Supreme Court upheld the measure† and the principle therein laid down was approved by the Privy Council in another case ‡ The Council observed that section 93 of the British North America Act, under which both the cases arose, protected legal

Some decisions of the Privy Council affecting minority rights

* R M Dawson Constitutional Issues in Canada, 1900 31, pp 347-53

† *Ex parte* Renaud, 2, 445 Cartwright

‡ Maher *v.* Town of Portland, 2, Cartwright 486 note

rights only and not *de facto* privileges such as the Catholics claimed to have enjoyed in the province It is no use speculating what view the Dominion Supreme Court would have taken because that Court was not then in existence What is important to note is that the Judicial Committee could not persuade themselves to agree with the minority and vindicate their so-called rights Then comes that long-drawn dispute caused by the well known Manitoba School Act of 1890 That measure sought to deprive Catholics of their right to have their children taught according to the rules of their church and imposed on them an obligation to extend their support and patronage to schools to which they could not conscientiously send their children or wards By a unanimous decision the Canadian Supreme Court challenged the constitutionality of the Act and declared it to be null and void, and it may be noted that the majority of the judges were by faith Protestants On appeal in 1892 the Privy Council set aside the Supreme Court's decision and declared the Act to be *intra vires* of the local legislature The matter was finally settled by the Laurier compromise when the Privy Council in 1894 decided in favour of the contention that an appeal lay to the Dominion Government from the minority in view of the other provisions of sec 93 of the British North America Act

The third case of importance under this law arose out of the Ontario Regulation 17 which restricted the language of the French minority in certain Ontario schools The regulation was most vehemently attacked by the French as being a denial of the protection guaranteed under the Act The issue did not come up before the Federal Supreme Court It was taken direct to the Privy Council from the Ontario Court The Privy Council upheld the regulation and pointed out in the course of their judgment that the use of the French language in matters of education was not a natural right vested in the French speaking population and protected by the Act of 1867, * the only rights so protected being according to them, religious and not linguistic, a view which had *mutatis mutandis* been emphasised in pre-War international settle

* Ottawa Separate School Trustees v Mackell 1917, A.C 62.

ments for the protection of minorities in Europe In yet another case generally known as the *Tiny Township* case the issue was whether the Catholic minority had the right, which they claimed, "to a greater degree of control over the courses of study in their separate schools, to a larger share in the educational grant from public funds and to exemption from assessments for the support of and continuation of high schools" The Provincial Courts opposed the claim and the appeal to the Federal Supreme Court was dismissed inasmuch as that Court divided equally, the Protestant judges holding against three Catholic learned brothers The appeal was also quashed by the Privy Council* so that the decisions of the Ontario Courts which were opposed to the minority claims were allowed to stand In some other cases such as the *Guiford case*,† the conviction of Louis Reil in 1885,‡ and the *Despatie-Tremblay* case,§ etc , it has been found that the appeal to the foot of the throne constitutes no additional safeguard for the protection of minorities in the Dominion of Canada

The safeguard is not effective

It cannot, therefore, be said that to go from the Supreme Court to the Privy Council is to appeal from Philip drunk to Philip sober Nor is there any reason to think that the Council is, by the very nature of its composition and personnel, likely to be more considerate and sympathetic towards the claims of the minorities than the Federal Supreme Court The law provides that the Supreme Court of Canada must have at least two lawyers from the Quebec bar as representing and speaking for the minority, and that Court is, therefore, expected in ordinary circumstances to be more responsive to minority opinion in its decisions than the Judicial Committee of the Privy Council. It is also reasonable to presume that the Federal Court's closeness to the scene of controversy and the fact that its judgments are likely to be vigilantly and scrutinisingly watched on the spot by the people concerned "compel a more cautious attitude and a more thorough delibera-

* 1928, A C 363
† L R 1874, Vol VI, p 157
‡ L R 10 A C 675
§ 1927, 1 A C, 702

tion ' than may be expected of the Imperial Court in London There is further no ground for supposing that the religious or racial conflicts are confined only to Canada or that the Privy Council is more impersonal than the Federal Supreme Court so that it is wrong to think that *toleration is an English and not a Canadian virtue* Facts as well as arguments are decisively against the retention of the Privy Council appeal as an effective and adequate instrument of minorities protection* and there is a considerable body of *opinion which is opposed to the Privy Council* appeal † It is gradually dawning on us, remarks Professor Kennedy, a great Canadian authority on constitutional law, "that such claims (that the appeal is necessary to protect religious, racial and minority rights) are unworthy of our *stature* and of our judicial honour '

States or Provinces *vis-a-vis* the Federation.

The fact, however, cannot be ignored, in the growth and development of Canadian constitutional law, that the Privy Council *has not only safeguarded* but extended the rights of the provinces *vis-a vis* the Federal Government As Mr F R Scott says, the Privy Council has carried its protection of provincial claims *so far that to-day we have in Canada a distribution of legislative* powers quite unlike that which was agreed upon at confederation ‡ The same view has been taken by Professor Kennedy and expressed practically in identical words The scales were heavily weighted against the provinces when the Dominion was constituted by the Quebec resolutions but at the present moment as a result of sixty five years of legal and political development the provinces enjoy powers almost greater than those of the American States In either case the most cherished aims of the founders have been nullified § It

* Sec. 208 of the India Act of 1935 provides for appeal to the Privy Council from Indian Courts It is also provided for in secs 109-12 of the Indian Civil Procedure Code which of course is amenable to change by Indian legislation. The appeal is protected by implication by sec. 108 and definitely and specifically by sec. 110 (b) (iii) of the 1935 Act

† Consultation and Co-operation in the British Commonwealth compiled by Gerald H. Palmer p. 117 W P M Kennedy: *Essays in Constitutional Law* pp 155-59.

‡ Queen's Quarterly Autumn, 1930

§ W P M. Kennedy: Essays in Constitutional Law, p. 84.

has often been suggested that the protection of provincial rights in Canada constitutes safeguards for the minority and that in that view of the case the minority concerned cannot and should not agree to the dropping of the appeal. This opinion is shared amongst many others by the Council itself, but it is based on rather slender foundations. Had the minority been confined to French Quebec alone, minority rights and provincial claims would have been identical. As it is, the minority population is scattered throughout the Dominion, although it constitutes a majority in Quebec. Obviously, it is to the interest of the French-speaking minorities in Ontario, Manitoba and the Maritime Provinces to encourage centripetal forces and to have more power vested at Ottawa where under the Constitution the minority is able to exercise considerable influence in legislative and administrative acts or measures. The Canadian example has its lessons for those Mahomedan politicians in India, who in their demand for the vesting of residuary powers in the provinces under the Federal Government, have been inspired by an anxiety to safeguard their so-called rights. They are very much mistaken. It is better for the Mahomedan minority in their own interests to extend the power and influence of the Federal authority where they will have powerful representation than to strengthen the provinces where in the majority of cases they will, for all practical purposes, be a negligible minority unless some of them are dreaming of secession from the federation, a dream which both in the near and distant future is as fantastic as it is absurd and foolish.

Do Dominion safeguards protect Indians and natives?

The question that arises now is, have the safeguards discussed at length in the preceding pages protected the elementary rights of the natives in the Dominions and of the Indians who have settled there? The answer to this question will be attempted in the next two chapters. One point should, however, be remembered and it is that the natives in certain places (for example, in South Africa), literally speaking, are not a minority because they are larger in number than the European settlers who are in control of affairs. But although the former are not numerically a minority, they are practically treated

as such having been deprived, on account of their inferior culture and civilisation, of a proper and legitimate share in the control of the machinery of government, and hence the treatment accorded them is, for all practical purposes, connected with the problem of minorities protection

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CHAPTER X

Treatment of Native Races in the Dominions

The Imperial Government transfer control of the natives in Canada to the Dominion Government

In the following pages we propose to discuss the position of the natives in the Dominions Before the grant of responsible government in 1867 Canada had no definite control over American *Indian* affairs, the subject being reserved to the Parliament at Westminster Imperial control was subsequently transferred to the Government of the United Province, and in 1860 His Majesty's Government as a result ceased to make any fresh payments* or to enter into any new agreement for the benefit and protection of the natives Sections 91 & 92 of the British North America Act make provisions for the distribution of powers between the Federal Government and the provinces and Sec 91 enumerates 29 subjects in all, which come within the purview of legislative competence of the Dominion Parliament One of those subjects, that is to say, item No 24 concerns *Indians* and lands reserved for *Indians* When again by the Dominion Acts the boundaries of Quebec, Ontario and Manitoba were extended in 1912, it was made definitely clear that the care of *Indians* and their lands should be under the charge of the Dominion Similarly, in accordance with the terms of union with British Columbia, the Dominion Government assumed charge of *Indians* and the trusteeship and management of the lands reserved for their benefit This arrangement gave rise to some trouble as to the Federal authority *vis-a-vis* the rights of the provinces, and the matter was amicably settled in the case of Ontario by the Indian Reserve Lands Act of 1924 †

* Before the grant of responsible government to Canada and up to the year 1860 the Imperial Government made payments and concluded agreements for the benefit and protection of the natives

† Keith Responsible Government in the Dominions, Vol II, p 785

The attitude of the Six Nation Indians

Some of the *Indian* tribes in Canada, particularly the Six Nation *Indians*, had persistently put forward the claim that they were the allies of Great Britain and in no way the subjects of His Britannic Majesty * The claim was placed with considerable force and passion before the League of Nations and the representative of Persia gave it his unstinted and unqualified support It was finally settled that the agreements made by the Crown either through the Canadian Government or through His Majesty s Government in England were not treaties in International Law but matters of domestic concern to Canada and that *Indians* had no *locus standi* except as subjects of the Crown † In 1925 the assurance was held out to those tribes that the Canadian Government would promote the cause of their education and pay due attention to their legitimate grievances Already during 1917 1920 those tribesmen who had fought on behalf of Great Britain during the War had been given the right to vote

Provisions in regard to education and reserved lands of the *Indians*

It has been the consistent policy, as Professor Keith points out ‡ in Canada to assure the *Indians* security in their reserved lands, to guarantee education for their children and to assist them to rise in the scale of civilisation and become full citizens of the Dominion In 1920 a definite move was taken by the Dominion Government for the improvement of the education of the natives and for extension of their franchise Every *Indian* child between seven and fifteen years old was required to attend school and the Governor-General in Council was empowered to establish for the benefit of *Indians* day, industrial and boarding schools Besides a scheme was drawn up for compulsory enfranchisement This scheme was opposed by the Six Nation *Indians* on the ground amongst others that under it an enfranchised *Indian* acquired title to a

* This sentiment found expression in the opposition to the inclusion of *Indians* in the compulsory service scheme of the 1917 Canadian legislation although a high percentage of voluntary *Indian* enlistments in the Canadian forces indicated a warm response *to the call of the War*

† Canadian Annual Review 1923 p 209 *Cf* the position of the Indian States *vis-a-vis* the British Government

‡ Keith Responsible Government in the Dominions Vol II p. 786 Nearly five million acres of lands have been set aside for about 120 000 *Indians*

proportion of the Treaty money paid to the band and a part of the tribe land which he might then sell to a European—a process which threatened the total extinction of the tribal lands. The scheme was amended in 1922 substituting free choice for compulsion.*

The problem of the natives in South Africa is politically one of far-reaching importance. According to the census of 1921, the European population numbered 1,519,488 as against 5,409,092 of the non-European stock. The latest figures show that the natives constitute 67 p.c. of the total population in the town, exclusive of mixed and other coloured population, a fact which invests the problem with an importance in no way comparable to like problems in the other Dominions. It ought to be clear at the very outset that the treatment accorded to the native residents in the Union is not identical in all its constituent parts. The position in the Cape differs fundamentally from the rest of South Africa.† As early as 1852-53 when representative government was conceded, the principle was laid down that no discrimination should be observed under the constitution of the Cape as between natives and coloured races on the one hand and the white people on the other. Under the Act of 1892‡ the ability to write one's name gave one the right to admission to the electoral roll. That provision was objected to by the European races, and they succeeded not of course in prejudicially affecting the franchise as defined and protected under the law but in excluding the natives in 1909 from eligibility for entry into the Parliament. The natives, therefore, possess the right to vote but cannot enjoy legislative honours. In the Cape a large number of natives, who are qualified in respect of property

The problem is more serious in South Africa; the policy is not uniform throughout the Union.

* In 1933, however, without prejudice to the Treaty rights compulsory enfranchisement was approved on the report as to fitness by a judge, an officer of the Department concerned and a member of the band. An enfranchised *Indian* with his wife and children enjoys in law the status of any other British subject in Canada. By marriage with a non-*Indian* an *Indian* woman earns exemption from disability.

† Wilmot, South Africa, II, 173 ff., 196 ff., III, 22 ff.; Cape Parliamentary Papers, 1909, A, 2 and G, 19, 1910, G, 26.

‡ Act No. 9 of 1892. In 1933 in the Cape the number of non-European voters was 35,781 while that in Natal was only 316.

or salary or education, are registered in the electoral roll In Natal they may enjoy the franchise only under the authority of the Governor General In the Transvaal, Orange Free State and South West Africa they have no franchise The same laws apply in the case of provincial legislatures, but in the Cape the natives, if qualified to vote, may offer themselves for election to the provincial Council Note should be taken of the right accorded to them in the province as distinguished from the Union Parliament * It is thus clear that there is no adequate and effective representation of native opinion in the Government of the country Even the Native Affairs Commission which is useful in many respects does not seem to supply the need of a permanent body of native representatives in the administration

In the Cape there is devolution of power for the benefit of the natives

In the Cape again except in the Transkeian area the natives enjoy complete freedom of movement without humiliating and irritating restrictions of pass laws Facilities are provided for their education and they cannot be prevented from acquiring skill as workers In addition the Government have now come to recognise their right to higher education and the principle involved was given effect in 1923 by an Act of that year by which the South African native College established in 1914 was recognised as a centre of higher education It is entitled to Government grants in aid We find the Cape also anticipating the League of Nations procedure for the protection of the minorities in some of the newly created States in Europe by means of devolution of powers as in the Ruthene Territory and the Aaland Islands The Glen Grey Act of 1894, for instance gave the natives a Council whose function it was to levy rates and to spend the proceeds on the improvement of roads irrigation works, development of agriculture, promotion of public health and rearing of cattle Similar provisions were made in the following year for the Transkeian area The Councils created were supposed to be autonomous bodies but the Governor-General exercises wide powers in

* Regarding the franchise laws in the provinces read the Electoral Act of 1918 as amended in 1926 1928 1930 and 1931 It may be stated here that the conditions in respect of the natives which were prevalent at the time of the Union have not been materially altered by subsequent legislative measures up to 1931.

regard to their composition and the discharge by them of their responsibilities.

The right to vote in South African colonies except in the Cape never recognised

So far as the other colonies are concerned, the native right to vote at elections was never admitted It was part of the condition of surrender on the part of the Boers that no step seeking to extend the franchise to the natives would be taken in the Transvaal and the Orange River Colony before the inauguration of representative government In Natal the native right to vote was reduced practically to a mockery inasmuch as on the electoral register there were only four hundred and fifty native voters as against 31 000 belonging to the European stock The Transvaal and the Orange Free constitutions perpetuated the principle of racial inferiority by refusing the natives the equality of status in State and Church, and Act No 23 of 1911 is an instance in point

Many other humiliating restrictions

A series of pass laws imposed restrictions on movements and freedom of choice of work on the part of the natives The efforts of the South African Native Affairs Commission, 1903-05, the Select Committee on Native Affairs appointed by the Assembly in 1914, the Departmental Committee appointed in 1919, and the Native Affairs Commission, 1920, directed towards the removal of those restrictions, proved abortive The opposition led by the European settlers was so strong and persistent that the Native Registration and Protection Bill of 1923—a measure limited in its scope and inadequate for the purposes of protection—had to be ultimately withdrawn to allay European fear In 1865, however, when the Imperial Government still retained control over the colonies certain steps were taken in Natal to exempt the natives in the higher scale of civilisation from disabilities and humiliations imposed generally on their race The policy later on followed by Lord Milner was narrower in outlook By a proclamation in 1901 in the Transvaal, and by an ordinance of 1903, in the Orange River Colony, only well-educated adult natives engaged in certain specified occupations were exempted from restrictions contained in the pass laws *

* Cf Parl Papers, cd 714, 904.

The curfew proclamations and their effect

But as a general rule pass laws operate in all parts of the Union barring the Cape (excluding Transkei) Under the pass system every native must possess a document of identification issued under the authority of the Native Affairs Department It contains description of a particular native s tribe, father and place of birth Failure to produce a pass or exemption certificate, when required to do so by a police officer, constitutes a criminal offence In almost all the urban areas a curfew system has been introduced, and natives are not permitted under it to haunt a public place after nine o clock at night as it is alleged that their free movement at that time encourages theft and other crimes The pass laws and the curfew proclamations* are naturally vehemently attacked by the natives, but there is no reason to think that the authorities responsible for them are prepared or willing to relax them at present or in the immediate future In the Transvaal well-educated adult natives were also exempted from taxation which the rest of their fellows had to pay Of course these measures were adopted in the time of Lord Milner whose native policy generally was characterised by bias and prejudice against the natives and lack of generous statesmanship Professor Keith is of opinion that for these small concessions credit should go to the late Mr Joseph Chamberlain who we are told believed not only in Imperial unity but also in the just and fair treatment of the natives † Formerly provision for grants for native education had been niggardly but in 1922 the provinces were compelled to allocate a definite sum for the promotion of native education‡ and *the Union undertook also to make adequate grants*

Discriminatory laws against the natives after creation of the Union.

Since the inauguration of the Union attempts have been made without adequate success to secure a uniform policy towards the natives throughout the *country in regard to matters relating to the* settlement of lands and conditions of labour There are four mem

* Under the Natives Urban Areas Act 1923 particular areas or districts may be proclaimed curfew areas.

† Keith Responsible Government in the Dominions Vol. II p. 900

‡ Act No 5 of 1922.

bers in the Senate who are nominated by the Governor-General in Council on account of their supposed acquaintance with the wishes of the native population, but it is well known that they have up till now exercised little or no influence on legislation They hold office on the same terms as the elected Senators But they need not satisfy the property test, and they can be removed on advent to office of a new Government This device was adopted to enable General Hertzog not to accept as Senators persons holding enlightened views on native policy One of the most humiliating laws passed was the Defence Act of 1912* by which the natives were debarred from taking part in the war In 1913 the land question was taken up and an Act was passed in that year which was based on the principle of segregation of natives It laid down that in areas reserved for non-native population under the Act no native could acquire lands or an interest therein The rule also applied to people other than natives so far as the native areas were concerned † In the Orange Free State no native could acquire by purchase or transfer any land at all In the Transvaal and Natal the position was a little better while the Appellate Division decided that the restrictive provisions of the Act of 1913 did not apply to the Cape thereby leaving the natives there as free as before to acquire land The Mines and Works Act of 1911 reserved thirty-two occupations in the Transvaal and the Orange Free State for 7,000 Europeans to which the natives had no access, and an agreement between employers and workers made in 1918 added nineteen other occupations as the preserve for European settlers

The Native Affairs Act provides for Commission to look after the interests of the natives

In 1920 a Native Affairs Act was passed which created a Commission to meet occasionally and act under the Minister for Native Affairs with regard to matters relating to the general administration or legislation of the native population The law contains a provision that in the event of the views of the Commission being rejected by the Minister the points at issue could be placed before the Governor-General in Council

* Sec 7
† Act No 27 of 1913

and, in the last resort, brought to the notice of the Parliament * The Commissioners could also sit on the legislature for the purpose of creating local councils for native areas to look after the construction of roads, drains water supply, irrigation, agricultural improvements maintenance of hospital and educational facilities with power to raise rates and local cesses, such councils having official chairmen Lastly, authority was given for convening formal meetings of native chiefs and members of local councils to discuss and consider questions of importance affecting the welfare of the native population A Conference was accordingly held in 1922 which the Native Affairs Commission attended, to discuss the Native Areas Bill Another was held a year later to consider the Native Marriage Bill and the Native Registration and Protection Bill and a third Conference culminated in the enactment in 1925 of a legislative measure on native taxation

The Natives (Urban Areas) Act of 1923,† which is the result of the labours of the Commission is an attempt to deal with the question of giving the natives proper protection and security in urban areas It required urban local authorities to set apart lands for their accommodation It also enunciated certain principles regarding the administration of their affairs such as the establishment of a native revenue account and of native advisory boards The Governor General is empowered under the Act to confer or exercise by proclamation, certain powers of control under which the native population may be limited in accordance with the legitimate needs and requirements of the community They are required to live in locations in certain urban areas such as Cape Town Port Elizabeth, Bloemfontein and in the mining and industrial areas in the Transvaal Durban and Pietermaritzburgh ‡

A scheme segregating the natives and abolishing the native vote in the Cape.

In 1925 the Government of General Hertzog introduced a measure seeking to shut out natives and Asiatics from skilled employments, although many of the so-called skilled European

* Cf the Schedule to the South Africa Act

† It was amended by Act 25 of 1930

‡ Natives (Urban Areas) Act 1923 as amended by No. 25 of 1930

miners learnt the technique from their native subordinates.* General Smuts who was then the leader of the Opposition vehemently attacked the Bill. It was passed on third reading in the lower House, but was rejected by the Senate. General Hertzog then formulated a new policy proposing segregation of natives and abolition of the native vote in the Cape in exchange for which the natives in each province obtained the right of electing two Europeans (in the case of Natal one) to represent their interests in the Parliament. The scheme was opposed by Mr. Tielman Roos in the Transvaal.

The Colour Bar Act violates the spirit of the Union Act

General Hertzog, however, succeeded in carrying through the joint session of the Union Parliament the Colour Bar Bill as the result of an agreement with the Opposition. Under the Colour Bar Act the natives were denied the right to obtain employments in a large number of industries. A limited acreage of land was placed at their disposal thereby preventing them from prospering in agriculture also. This policy was adopted on the plea of the preservation of the European race in the Union, but it was not at all warranted by moral considerations. In view of the Union enjoying responsible government Westminster did not dare intervene and nullify the Act. Nor did the proposal of General Hertzog made in 1929 seeking to abolish the Cape vote, which failed to secure a majority, evoke any protest from the Imperial Parliament.† It should be remembered in this connection that under the South Africa Act of 1909, the Cape vote was safeguarded by the provision that it could not be abolished except by an Act passed at a joint session of the two Houses of the Union legislature and by the votes of not less than two-thirds of the members of both Houses.‡ The safeguard was further reinforced by a definite promise that a clause

* This came as a aresult of the Court's decision in Attorney-General v. G. H. Smith in which it was laid down that the legal colour bar by regulation was *ultra vires* (J. C. L., VI, 215 ff.)

† Keith: The Sovereignty of the British Dominions, p. 72. The general tendency in all the self-governing Dominions is towards non-interference by the Imperial Government with the Dominion laws or administrative measures even affecting the native races. It is inevitable, especially in view of the ever-increasing sovereignty of the Dominions.

‡ Lord Crewe's speech in the Lords, July 27, 1909.

should be inserted in the Royal Instructions to the Governor General requiring him to reserve any Bill proposing to abolish the Cape vote, for the pleasure of the Crown General Hertzog's Bill thus constituted a direct and flagrant violation of the law that the Cape vote could not be taken away except through the consent of the Crown But the fact cannot be ignored that long usage and the Statute of Westminster, 1931, have rendered the protection in the shape of reservation into one of doubtful value *

Certain legislative measures concerning the natives

The Joint Committee of the Union Parliament recommended certain measures in April 1935, apparently with a view to improving the position of the natives in the Cape Under the Native Representation Bill the vote of the natives already registered will remain but no more natives will be enrolled as voters Those who are on the electoral roll will have the right to elect four European Senators in addition to the Senators at present nominated by the Government to represent native interests on account of their special knowledge of native affairs The natives will have a Representative Council partly elective and advisory in character to which all Bills and provincial ordinances affecting them will be referred for opinion In the Cape again they will have two representatives in the Provincial Council to be elected in the same manner as the four Senators The second Bill proposes to create Trustees to acquire 15,000,000 acres of land for the settlement of the natives The Trust, however is not intended to interfere with the existing demarcation between European and native agricultural areas It appears that the Governor-General as the Crown's representative will have a large measure of control over the projected Trust The measures it is clear, constitute in no sense a reversal of the policy of segregation They indicate on the contrary, a triumph of that policy We have our doubts if the natives and the Union

* *Apropos* of the South Africa Amendment Act 1934 declaring that no province shall be abolished or its powers curtailed or its boundaries altered except upon a petition of the Provincial Council concerned the Government made it clear that inasmuch as the constitution was after the Status Act left without any safeguards the protection contemplated in the 1934 Act could not bind the Union legislature. *Cf* the speech of Mr O Pirow K. C Minister in charge of the Bill.

will stand to gain by a scheme of separate racial representation in the legislature But everything will depend on how the natives accept and work it The representation proposed to be given them does not seem to be adequate Nor is there any anxiety on the part of the sponsors of the measures to alter or even relax the so-called "white standard of living and civilisation," which has, not always without reason, caused a good deal of resentment and bitterness

Restrictions imposed on the natives

It is not these measures alone which are responsible for native unrest in the Union The exclusion of natives from the 1928 Old Age Pensions Act has been a factor of no mean significance in the steady deterioration of inter-racial relations Further stimulus was afforded by the "native menace" slogan on which the 1929 elections were fought All non-European women were denied the franchise accorded to women under the Women's Franchise Act of 1930, thereby accelerating the progress of reaction It reduced the native voting strength to less than 2 per cent of the Union electorate Mention may also be made of the humiliating terms of the Native Service Contract Act of 1932, the exclusion of natives from the legislative provisions for settlement of industrial disputes, the prohibition of native employment on the Railways and the discriminating tariff compelling preference for white labour in the manufacturing industries It is significant that such a conservative thinker as Professor Keith, who has learnt to measure his phraseology with the precision of a trained lawyer, has felt constrained to remark that "the result has been loss of earning power for the natives, the growth of anti-white prejudice, and the embitterment of race relations"* The restrictions imposed on the natives may therefore be summed up under the following heads, *viz*, (I) exclusion from electoral privileges, (II) exclusion from liquor privileges under the Liquor Act of 1928 save in respect of certain exempted non-Europeans, (III) exclusion from certain areas in the Union, (IV) disabilities as regards freedom of movement as specified in the Pass Laws and in the Natives

* Keith The Governments of the British Empire, p 233

(Urban Areas) Act, and (V) disabilities contemplated in the Service Contract Act

In fairness it must be admitted that native law has received some measure of recognition in the judicial system in South Africa It is customary law similar to Roman Dutch law or English common law, and is unwritten Being unwritten, there are some discrepancies in the native laws But generally, as Kennedy and Schlosberg suggest, certain maxims are followed in their application Native laws for instance, apply only in disputes between a native and a native and not where a European is a litigant This is subject to the general principle that the courts will not recognise laws which are repugnant to public order, public policy, morality chastity, equity or natural justice Those customs for instance, are void and of no effect which are inconsistent with the very essence of the conjugal union, *e g*, incestuous marriages Wherever any native law treats a woman as a chattel that law is superseded by the English legal doctrine that there is no right of property in the person of a subject of the Crown No claim is sustainable in the courts which involves a litigant in slavery Native laws and customs must be proved as facts, and where they do not offer a remedy the ordinary law will apply An attempt has been made to set in order the native administrative and legal system under the provisions of the Native Administration Act, 1927 The Act has accorded recognition to native law throughout the Union subject to the maxims as laid down by the courts and indicated above and made provision for special native civil courts The measure seems to have widened the gulf between the contestants rather than bridged it in so far as it has tended to strengthen tribalism *

Professor Keith thinks that the question as to how the natives are treated in South Africa is of peculiar importance to the Union inasmuch as the Imperial Government must take it into consideration in deciding whether or not the control of Bechuanaland Swaziland and Basutoland should be handed over to the South African Parliament The Imperial Government are under a

* Keith: The Governments of the British Empire p 232; Kennedy and Schlosberg: The Law and Custom of the South African Constitution pp. 405-06.

legal and moral obligation to protect the rights and interests of the natives resident in those territories.[1] The question before the Parliament at Westminster is whether the policy of the Union, in so far as it affects the native population under its direct supervision and control, is dictated merely by regard for European interests and by callous indifference to the rights of the native residents. If the policy is influenced by such narrow and selfish considerations, the Imperial Government would be committing a breach of faith by extending the jurisdiction of the Union over those lands. The natives have agreed to live under the authority of the Imperial Parliament on the definite understanding that their interests would be adequately protected and that no transfer of jurisdiction should take place unless the natives were satisfied that it would involve no curtailment of their rights and privileges. The British Government seem to have taken care to allay the anxiety of the natives by an elaborate schedule attached to the South Africa Act. The Act itself lays down principles seeking to secure just and fair government for those people as was made clear in the speech delivered by Lord Crewe on the South Africa Bill in the House of Lords, 1909. The schedule to the Act in question provides for a permanent commission of three members to advise the Prime Minister in regard to the native problem with the right of appeal to the Governor-General in Council. The Commission is entitled to demand publication of the relevant papers with the approval of the same authority. There are also provisions in the schedule which were intended to serve as a check upon the excesses of the Union Parliament. Any law passed by it is liable to disallowance by the Crown. The lands of the natives in Basutoland and the reserves in Bechuanaland are treated in law as inalienable. Any Bill passed by the South African Parliament altering the schedule, does not become law unless the Crown has given its assent to it, a kind of safeguard which, as has been indicated above, has become illusory for all practical purposes, particularly after the passing of the Statute of Westminster.

The transfer of certain territories to the Union Government depends on their treatment of the natives already placed under their charge.

[1] *Cf.* the schedule to the South Africa Act.

Imperial intervention no protection

The issue involved in the question of transfer to the Union of Basutoland, Bechuanaland and Swaziland* has become exceedingly delicate after the enactment by the Union Parliament of the Royal Executive Functions and Seals Act (No 70 of 1934) Section 7 of that Act transfers the authority of the King in Council under the South Africa Act of 1909 to the Governor General in Council What then prevents the Union Governor General in Council from adopting legislation with regard to the native territories destroying the protection of the schedule except resort to a deliberately hostile action by the British Government? Will the latter dare take it? The real safeguard seems to lie in the refusal on the part of the natives themselves to submit to the Union sovereignty and not in the present circumstances in Imperial intervention In the course of a speech in the House of Commons on July 16, 1936 Mr Malcolm Macdonald Secretary of State for the Dominions referred to the terms of the *Aide Memoire* of 1935 and stated that there was no agreement or understanding between the Governments (the Union Government *and the Imperial Government) on the transfer of the territories* The transfer is contemplated but there is no certainty about the date The matter is allowed to rest on the co-operation between the natives and the Union Government *and on the confidence that the latter can command by a* large-hearted and generous policy †

The position of the natives in Australia is somewhat better

The position of the natives in Australia seems to be somewhat better than in South Africa It appears that in the Commonwealth the full blooded aboriginals are dwindling away as a result of contact with the European races The native population was put

* These territories are now under the control of a High Commissioner who acts also as High Commissioner for the United Kingdom in the Union. Something like a parallel is to be found in the provision in the 1935 India Act (Sec 8) for the appointment of His Majesty s Representative as regards relations with Indian States The Governor-General himself will hold that office but two different persons for two different offices are not altogether ruled out on strict construction of the section.

† The Native Trust and Land Bill of Mr Grobler the South African Minister for Native Affairs contemplates the establishment of a Native Trust to be administered by the Governor-General With money provided by the legislature the Trust will buy land for native settlement bringing the total area of native lands from

at 150,000 when the European settlement first began There are no authentic figures to-day as regards the exact number of the aboriginals It is estimated to be 63,000 including 13,000 half-castes The vast majority of the natives reside in Western Australia, in Queensland and in the Northern Territory It is stated that considerable strides have been made in regard to the protection of the aboriginal tribes in Victoria and New South Wales * Records show that the Aborigines' Protection Board of Victoria had under its care in 1925 about 375 natives and spent about £6,000 and that New South Wales gave protection to 1,554 full-blooded aboriginals and a number of mixed blood at a cost of about £35,000 Similarly South Australia maintained in 1924 about 650 natives at mission stations and incurred on that account an expenditure of a considerable sum of money † At the time when the Northern Territory was transferred to the control of the Commonwealth an Act‡ was passed for the purpose of safeguarding the natives against unfair treatment In Queensland departments were established in 1897 and 1902 to look after the interests of the aboriginal tribes and the annual expenditure incurred on their behalf comes to about £40,000 The Commonwealth of Australia budgeted for a yearly sum of about £10,000 for the care and protection of the natives

The Australian colonies impose restrictions on the natives

So far as the Australian colonies are concerned, the Imperial Government have abdicated their authority in regard to the native problem on the grant of responsible government to the Commonwealth It must be noted at the same time that the natives do not enjoy the franchise in Western Australia, Queensland and the Northern Territory In the first of these places, they are handicapped by additional restrictions In 1886 a Board was established there to take care of the natives which was placed under the direct supervision of the Governor When the demand for res-

20,000 000 odd acres to 34,000,000 The Hertzog Government have promised to spend £10,000,000 for the next five years under the terms of the measure

* Act No 25, 1909 (New South Wales), Nos 1059 and 2257 of 1890 and 1910 (Victoria)

† Assembly Debates, 1910, pp 709, 721.

‡ Act No 1024

ponsible government was made it was supported by the then Governor of the State on condition that the Governor whoever he might be, must continue to retain his control over the Board, and his view was *accepted and embodied in the constitution of* 1890 in the teeth of opposition from the Ministry * The Governor had a grant of £5,000 provided out of the consolidated fund for the benefit of the natives This scheme was something like a dyarchy and worked creakily In 1894 the local legislature carried through a measure designed to put an end to the Governor s control but it was reserved by the latter and never assented to by the Crown Three years later, however the system was abolished A new Act had to be passed in 1905 † with adequate provisions against ill treatment and fraud by employers But the practice still prevails of handcuffing the natives when suspected of crime and of carrying them through long distances to prison The practice, unfair and humiliating by itself was grossly abused by the white settlers and racial bitterness was as a result accentuated In 1911 ‡ the Government did some tangible work in the matter of native education and care of the half castes and made liberal provisions for land reserves in excess of the limit formerly set It was followed up in 1924 by further gestures in the desirable direction The natives are now encouraged at all institutions and mission stations to do the work of which they are capable Elementary education is provided for their children The total expenditure in the Commonwealth for them now amounts to £150 000 as compared with £ 56 000 in 1906

In Papua the proceeds of the native tax spent on native education.

In Papua the land rights of the natives whose number is roughly estimated at 275 000 are protected Special care is taken to see that the labour contracts are of a voluntary character The magistrate must satisfy himself before the contracts are made and enforced that the natives have not been forced to accept terms under compulsion or duress They must not be kept in detention or ill treated and the remuneration must be fair and the wages paid

* Parl. Papers c. 8350

† Act No 14

‡ Act No 42.

in the presence of a Government officer * Under the Native Taxes Ordinance of 1918 any native fit for work may be called upon to pay a certain kind of tax the proceeds of which must be spent on the promotion of native education and furtherance of identical interests The Government stand pledged not to employ forced labour for the benefit of the European settlers and to the detriment of native prosperity. The aboriginals are not, however, eligible for entry into the Commonwealth save on temporary permits granted for special purposes—a restriction which applies equally to all the coloured races On the other hand, the natives are protected from Asiatic immigration or exploitation by the restrictive immigration laws of the Federal Government In ordinary circumstances law-making is the function of a local legislature of officials and nominees of the Government subject to supervision in native interest The Commonwealth Parliament may also legislate Native instrumentalities in administration are given due weight, and direct dealings between Europeans and natives are forbidden Sales of land, if any, are made to the Government who in their turn are competent in the exercise of their judgment to make grants to Europeans

How the rights of the Maoris in New Zealand maintained

The original relations between the Maoris and the European settlers in New Zealand had been extremely bitter † In 1840 an agreement was concluded called the Treaty of Waitangi according to which the Maoris were granted possession of their lands, the Crown retaining the right of pre-emption ‡ The Imperial Government reserved to themselves the ultimate control of matters affecting them and their interests § The Crown bound itself by Letters Patent to observe the laws, customs and usages of the aboriginal tribes and to define the specific areas to which they would apply But things did not shape well for any length of time Although matters relating to the natives were placed under the direct charge of the Governor, he did not

* J H P Murray Review of the Australian Administration in Papua (1907-1920)

† Parl Papers, c 3382

‡ Keith Responsible Government in the Dominions, Vol II, p 788

§ Clause 71 of the Constitution of 1852

take sufficient care to administer and look after them properly Unrest and war were the inevitable results and within two years *viz*, from 1864 to 1866, altogether 3,568 square miles of valuable lands were appropriated There is truth in Professor Keith's accusation that the European settlers were moved as in Kenya by the lure of the natives lands *

The Maoris represented in the legislature and the Executive Council.

In 1867 four natives elected by the Maoris themselves were appointed to be members of the House of Representatives and five years later two Maoris were added to the Council In 1881 the number of Europeans in the House was 91 It was reduced to 70 in 1890 and to-day the figure has been raised to 76 The Maori voters have more than their proportionate share of representation in the legislature The Maoris thus seek to safeguard their interests by lending their support in the legislature to those political parties that are mindful of their needs and requirements In 1899 a half-caste Maori was taken into the Executive Council—an innovation which has done much to influence the administration to pay due attention to the rights and interests of the native population Efforts have been made since 1861 to secure the native population in the possession of their lands, and with that purpose in view a Native Land Court was established in 1865 At present the function of the court is to deal with questions relating to title succession, transfer and partition An Act was passed in 1900 empowering the Native Land Court to validate the customs usages and practices of the Maori tribes † The title for the native land in New Zealand seems to be definite and clear, but the Crown has reserved to itself the power to declare by proclamation under the provisions of the Act of 1909 that the native title in any particular case has been extinguished

Until 1879 the subject of native education had been dealt with by special laws and ordinances The beginning was made in 1847 It was reinforced by the legislation of 1858 which provided for an annual grant of £7 000 for the encouragement of native education

* Keith: Responsible Government in the Dominions Vol. II p 789

† See Wi Parata v Bishop of Wellington 3 N Z. R. (N S.) S C 72; Nireaha Tamaki v Baker (1901 A.C. 561) Tamihana Korokai v Solicitor-General (32 N Z L. R. 321)

In 1879 the control of native education was transferred to the Education Department of the New Zealand Government

The Cook Islands were brought in 1901 within the boundaries of New Zealand but were placed under a special form of administration by the Acts of 1915 and 1921 The Act of 1915 created a Minister for the Islands and a Secretary for the Islands in New Zealand, while there were resident Commissioners at Rarotonga and Niue, with Resident agents in other islands, if necessary,* and it also provided for the establishment of Island Councils at Rarotonga and Niue † These Councils are composed wholly or in part of *ex-officio* members being European officials or Arikis, native chiefs and nominated and elected members, and have power to make laws for the peace, order and good government of the Islands subject to the revisionary jurisdiction of the New Zealand Government Nominated members hold office during the pleasure of the Governor-General or for a fixed period which must not exceed five years The laws which are repugnant to the Acts of the New Zealand Government may be declared invalid to the extent of their repugnancy The laws must receive the assent of the Resident Commissioner or the Governor-General before they can have full force and effect Any ordinance which has received the assent of the Resident Commissioner may be disallowed within a year by the Governor-General The Act of 1921 gave the Council of Rarotonga an elected European in addition, to represent the interests of the European community there Rarotonga has a High Court with a chief judge, and Niue has only a judicial officer Appeal in either case lies to the Supreme Court of New Zealand There is also a Native Land Court whose work is similar to that of the Land Court of the Maoris The general policy is one of conservation of native custom, but legislation is freely resorted to for the purpose of abolishing what, in the opinion of the New Zealand Government, are pernicious practices ‡

The Cook Islands receive special treatment, Islands Councils established

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* Keith Responsible Government in the Dominions, Vol II, p 791

† For the sake of convenience Niue has been placed under the jurisdiction of Western Samoa subject to the right of intervention by the Minister for the Cook Islands

‡ *Cf* the maxims laid down by the courts in connection with the native custom in South Africa, p 302, *supra*

CHAPTER XI

TREATMENT OF INDIANS IN THE DOMINIONS

The treatment accorded to Indians in some of the self governing Dominions forms in the opinion of many a rather damaging chapter in the history of the British Empire It proves that the conception of a common Empire citizenship is practically a myth so far as its incidence is concerned Indian nationals are in law as much the subjects of His Majesty as the European settlers in the Dominions* and yet His Majesty s Indian subjects resident in the Dominions are denied some of the elementary rights of citizenship

Australia takes the initiative in anti Indian legislation Mr Hughes defends White Australian policy

The first series of anti Indian measures began in Australia in connection with the reservation of gold mines In 1878 Queensland passed an Act† preventing Asiatics from working on a gold field for three years after proclamation and the law applied to Indians and the Chinese also Indians were also excluded from the sugar and banana industries then existing in the Colony In Western Australia they were prevented in 1886 from holding miners rights on gold fields and this restriction was supplemented by an imposition of a poll tax ‡ In 1901 the Commonwealth of Australia placed on the statute-book the Immigration Restriction Act laying down a dictation test by which an immigrant had to write a passage of fifty words in a European language, and it effectively restricted immigration and excluded Indians from the territory This scheme was inspired by what is known as the White Australian Policy which according to the Rt Hon ble W M Hughes, is an integral part of the national life of the Australian people § Mr Hughes

* See Chap. XVII *infra*

† Act No. 8 1878.

‡ Act No. 13 1886

§ Hughes: The Splendid Adventure p 357

makes it clear that for the people of his racial stock the only alternative to national extinction is a policy of exclusion and holds that the geographical, racial and economic circumstances justify it. He refers to the racial equality clause introduced by the Japanese delegates before the League of Nations, his own opposition to the clause and the final decision of the League in the matter Mr Hughes is emphatic on the point that the nationals of a foreign country have no right to enter the territory of another State,* if and whenever they desire There is no doubt that Mr Hughes is correct so far as the States which are not parts of the British Empire, are concerned The latest development of Dominion status strengthens his view also in regard to Indians resident in the Dominions But the logical conclusion of such a policy is bound to prove a disruptive force in the British Commonwealth of Nations

Queensland deprives Asiatics of the franchise

In 1925 the Commonwealth passed an Immigration Act empowering the Governor-General to exclude from entry into its territory, either wholly or subject to restrictions, of persons of any nationality, race or occupation if he was satisfied that such entry was undesirable on economic, industrial or other grounds He might forbid entry also on the plea that the persons named were not otherwise suitable for admission and did not permit of assimilation That measure was in the main directed against Italian immigration, the reason suggested being that immigrants of Italian extraction were determined to maintain what might be called racial isolation In that year, however, an Act was promulgated by the Commonwealth extending the federal franchise to natives of British India, being inhabitants of Australia and resident there for at least six months Such Indians were to be treated in law as ordinary citizens Thus effect was sought to be given to the spirit of the resolution of the Imperial Conferences of 1921 and 1923 † In 1904 the Government of Queensland set a very bad example from the point of view of Imperial solidarity by imposing humiliating restrictions on Asiatics as re-

* Hughes The Splendid Adventure, p 359
† Parliamentary Papers, Cmd , 1974 *Ibid*, Cmd , 1987,

gards agricultural advances,* and that example bad in itself was followed up by another Act which deprived Asiatics of the franchise which had hitherto been exercised by them for the Assembly †

Western Australia most energetic in promulgating anti Indian laws

The most energetic ' of all the States in the Commonwealth in the matter of anti Indian legislation has been Western Australia The Factories Act the Mining Act and the Early Closing Act Amendment Act passed in 1904 in quick succession containing as they did ample provisions for discriminatory treatment against all Asiatics bear out this point and these laws provoked some adverse comment from the Imperial Government who were attacked and abused in the Assembly ‡ Again a proposal to amend the Factories Act also called forth violent attacks on the British Government In 1907 an Act was passed which as in Queensland disfranchised the Asiatics in connection with the Assembly elections News was received at New Delhi some time ago that at a recent meeting of the local Legislative Assembly in Western Australia a Bill had been introduced to remove disabilities against the Indian residents for being registered as electors for the Assembly At the time of writing however all the Asiatics were disqualified The present measure is intended to remove the disqualifications to which Indians are subjected The Factories and Shops Act of 1920 § further imposed upon the Asiatics intolerable restrictions They could not be employed under that Act except on certain conditions || nor could they be registered as owners or occupiers unless they satisfied those

* Act 13 1904.

† *Cf* also 51 Vict No 11 s 7; 56 Vict No. 11 s 43 61 Vict. No 25 s. 85 News was received in Calcutta on the 31st of March 1931 that the Queensland Local Franchise Law had at last been amended to allow Indians resident in the State to vote at elections to the State legislature

‡ Parl Deb XXVII 96 ff

§ Act No 44

|| No Asiatic could be employed as a labourer unless he had been registered as such before November 1903. He could not work longer hours than a woman or before 8 A.M or after 5 P.M All furniture imported or manufactured in the State had to be stamped European labour or Asiatic labour as the case might be

conditions. The term "factory" meant one thing for them and quite a different thing for other races South Australia also experimented with a long series of anti-Asiatic legislation for five years commencing from the year 1901 * In the Northern Territory a law was promulgated in 1910 debarring the Asiatics from employing the aboriginals, and the franchise was withheld from the immigrants from Asia which meant that the restrictions did not apply to Asiatics born in that territory

The language test as a means of excluding Indians was adopted in Western Australia in 1897, in New South Wales in 1898, in Tasmania also in the same year and in New Zealand in 1899 All these measures were based on the Natal Act of 1897, which adopted the language test for the purposes of discrimination and forbade the entry into that State of paupers, criminals, diseased persons and idiots †

The New Zealand Immigration Act excludes Indians from the territory

New Zealand took the cue from Australia and passed an Act in 1920 known as the Immigration Restriction Amendment Act on the Commonwealth model which permitted the entry into her territory none but natural-born European British subjects The definition of British citizen adopted in the Act excluded naturalised British subjects and the natives of British Possessions, Colonies or Protectorates Persons other than natural-born British subjects could be admitted into the territory provided they promised in writing that they would permanently settle there This measure owed its origin to the suspicion that Indians had, in their anxiety to evade the provisions of the law, developed the practice of acquiring knowledge of English in Fiji to enable them to satisfy the language test, and also to the fact that large immigrations had proceeded from Fiji to New Zealand The Act was aimed principally at people who went to New Zealand for business, health and pleasure purposes and not at those who made New Zealand the land of their adoption ‡

* Act No 763, s 3, No 837, ss 19, 21, 50, No 890, s 5
† Keith Responsible Government in the Dominions, Vol II, p 814
‡ *Ibid*, pp 818 19

Anti Asiatic measures in British Columbia

The difficulties caused in British Columbia by the anti Asiatic measures were very great indeed * Attempts to accord differential treatment to the Asiatics had been made since 1897 but not always with success Powers of reservation and disallowance were very frequently exercised in the case of Bills and Acts respectively calculated to impose restrictions upon the Asiatics From 1897 to 1905 a large number of Acts failed to secure the necessary assent of the Crown Reference may be made in this connection to *the Labour Regulation Act* (c 28) *the Tramway Incorporation* Act (c 44) the Liquor Licenses Act (c 39), the Coal Mines Regulation Act (c 46) and the Immigration Act (c 11) In the year 1908 another legislative effort made by British Columbia for the purpose of regulating immigration was disallowed but not before the legislation had been declared illegitimate both as regards Japanese and as regards British Indians It was then that the Canadian Government stepped in and adopted a drastic measure They passed a law with a view to restricting immigration which imposed the requirement of possession of $25 subsequently increased to $200 on entry into the Dominion territory It also provided that an Asiatic immigrant must come from his place of birth on a through ticket purchased in advance and by a continuous journey In 1913 it was supplemented by the clause that no skilled or unskilled labourer could enter Canada *via* Columbia This led to a plot *culminating in the murder in* court of an agent of the Indian and Canadian Governments The requirement of the possession of $200 was subsequently waived in the case of a wife complying with the rule regarding continuous journey

The Federal Franchise Act excludes Indians from the right to vote.

The principle was accepted at the sessions of the Imperial Conferences of 1917† and 1918‡ that no unfair treatment should be accorded to Indians lawfully resident in the Dominion, and that they would be permitted to bring in one legally married wife and

* Canada Sess. p. 1900 No. 87 Provincial Leg 1896-98 p 77 *Ibid* 1901-00 pp 190 187 and 160.

† Parl Papers cd. 8560 p 190

‡ *Ibid* cd. 9170 p 105

children certified as being issues of such monogamous marriage by the Governor-General In 1919 a large number of Sikhs were permitted to bring their wives and children, but a year later the Federal Franchise Act was so amended as to exclude Indians from the Federal right to vote in British Columbia * The matter was raised by Mr Sastri in 1922 when he toured throughout the Dominions as the agent of the Governor-General of India on a mission to secure fair treatment in the Dominions for Indian nationals Mr Mackenzie King on behalf of the Canadian Government assured him that he was anxious to co-operate with the Government of India in evolving a policy honourable to both the Governments

The Pact between Canada and Japan the Dominion Act prevails over provincial legislation

The Pact† concluded between Canada and Japan in 1924 regarding the employment of domestic servants for families residing in the Dominion, and agricultural labourers, did not satisfy Columbia The step was considered to be a direct encroachment by the Dominion upon the rights of the Colony Besides, the terms of the agreement were, in its opinion, inadequate and disappointing All legal doubts were, however, set at rest by a decision of the Privy Council which affirmed the supremacy of Dominion legislation over any Columbian Act The Privy Council made it clear that it would declare null and void any provincial law aimed at expelling orientals from the place and that the Dominion Government had power to disallow any such Act

Nowhere in the self-governing Colonies did the Asiatic problem assume such an alarming proportion as it has done in South Africa In the Cape, of course, the Indian question did not take any serious turn, for the number of Indians resident there was negligible ‡ An Act,§ however, was passed in 1902 imposing a dictation test in a European language on all immigrants No

* Cunningham v Tomey Homma (1903), A C 151

† According to the Pact Japan promised that the number of Japanese domestic servants and agricultural labourers would not exceed 150 a year as against the previous limit of 400

‡ The number of Indians in the Cape according to the latest figures available is 6,000 while that in Natal and the Transvaal is respectively 160,000 and 20,000 The Orange Free State has excluded them

§ Act No 47

Indian language was recognised although Yiddish, the spoken tongue of a considerable body of the Jews was preferentially treated in a subsequent legislative measure *

Natal refuses to admit Indians to the electoral register

The position in Natal was extremely unsatisfactory It has been claimed with some show of reason that Natal owes its economic prosperity to Indian industry The native workers were not quite up to the mark, it was the Indians who had to make up the deficiency They soon began to grow in number and in wealth The European community obviously became jealous of them and placed on the statute book a series of measures designed to affect those very people whose industry and labour appear to have built up Natal In 1896 Indians were excluded from the franchise † on the ground that they had no idea of what a Parliamentary government was, a pedantic application of what might be called the competence test and a left-handed compliment to the British administration in India ! A year later a measure ‡ was promulgated providing that merchants who had no accounts in England or were not able to keep accounts there would not be permitted to hold trading licences That law was intended as the provisions contained therein suggest for the Indians only An attempt was made in 1905 to deprive them of the municipal franchise also but the Imperial Government intervened and succeeded in stopping the hands of the Natal Government In 1908 three Bills were moved in order to place economic restrictions upon Indian settlers the first to stop further grant of licences to Indian dealers the second to put an end within a fixed period to the validity of the then existing licenses, and the third to prohibit further Indian immigration The first two could not be put into operation as the necessary assent was refused Against the third a commission protested in 1909 An Act was however passed in 1909 which conferred upon the Indian settlers the right of appeal to the Supreme Court in the case of the renewal of trading licenses being refused to them § It ought to be borne

* Act No 30 1906.
† Act No. 8
‡ Act No 18 1897
§ Act No. 22

in mind that the trading licences were issued by municipal bodies or corporations which were dominated by the European community.

In the Transvaal matters had long been heading for a crisis In 1885* the Government insisted on taking definite legislative steps refusing to admit Indians to the rights and privileges of citizenship, forbidding the ownership of real property by them, segregating them in locations for trade purposes and imposing upon them exorbitant fees The British Government stubbornly opposed the proposals on the ground that they violated the provisions of the London Convention of 1884 In 1895 the question was referred to the High Court† and it was decided three years later that the law permitted the segregation of Indians in locations for the purposes of trade and residence Thus in the name of peace and order legislation was undertaken at the instance of Lord Milner to keep out Indians from the Transvaal whose right to re-enter that territory was based on excellent grounds In 1902 he made proposals for segregation and registration which the then Colonial Secretary refused to accept Then in 1904 a more comprehensive and worse scheme was promoted by Sir A Lawley. Segregation was there in the scheme There was also the insistence on registration and on payment of a tax ‡ In 1906 the Asiatic Law Amendment Ordinance was promulgated again requiring the registration of all Asiatic settlers The assent of the Imperial Government was deferred, but they yielded in twelve months' time Under the Letters Patent the Imperial authorities had power to reserve any Act meting out preferential treatment to Europeans as against non-Europeans, but that power was not exercised with the result that British prestige, as Professor Keith suggests, reached its nadir of humiliation in South Africa § In 1907 an Act was passed which practically kept out all Asiatics,

The scheme of segregating Indians in the Transvaal held legally valid

* Act No 3

† Parl Papers, c 7911

‡ *Cf* Habib Motam *v* Transvaal Government, (1904) T S 404, in which it was held that the Act of 1885 regulated residence in locations and did not apply to trading in locations

§ Keith Responsible Government in the Dominions, Vol II, p 828

who had not enjoyed the legal right to reside there before The executive was invested with the power to deport from the Transvaal any Asiatic whose presence there was considered to be detrimental to the interests of peace, order and good government

The Transvaal Gold Act imposes restrictions on coloured persons.

The Transvaal Gold Act* of 1908 subjected all coloured persons to a large number of disabilities They could not under that law acquire any right in the gold mines, nor could European holders of the right allow any coloured persons other than their domestic servants to reside in lands held under the right Coloured peoples were not permitted to reside in proclaimed areas in the mining district of Witwatersrand except in specified bazars locations and mining compounds To carry the process further, the Transvaal Government denied the Mahomedan prisoners the right to observe their religious ceremony and the Hindus were compelled to do work which meant the loss of caste † Again in 1909 forcible deportation was resorted to and a large number of Indians thus deported were placed over His Majesty s frontier—a device as effective for the purpose for which it was engineered as galling to the self respect of His Majesty s British Indian subjects Appeal was made to the courts questioning the validity of those laws decrees and ordinances But they decided that there was nothing that could prevent the Transvaal Government from laying down provisions for prevention of immigration and registration and for deportation ‡ Legally of course the courts were helpless

The Orange River Colony shuts out Indians

In the Orange River Colony an Act was passed in 1890 which shut out Indians altogether That Act was modified in 1907 so as to permit the entry of distinguished Indian citizens But regulations were still there which sought to prevent Indians as well as natives from using side walks travelling first class and riding in covered cars

* Act No. 35

† Parl Papers cd. 4327 4584 5363

‡ Hongkong v A. G 1910 Venter v R. 1907 Randeria v R 1909 Naidoo v R. 1909 Magda v Registrar of Asiatics 1909; Chotübhai v Minister of Justice 1910; Ismail v R.; and Laloo v R 1908

A deplorable lack of British statesmanship, the creation of the Union gives no substantial relief

Professor Keith justly complains that the British Government under "Lord Elgin and Mr Churchill made no effort to secure the elementary rights of the Indians before granting responsible government, though, when they were prepared to give that concession, they had every right to make it conditional on the Boers accepting a decent treatment of the Indians as a counterpart to the generosity shown to them "* The responsibility for this callous and unjust treatment towards Indians must be shared, according to him, by the Indian Government, the India Office, and the Colonial Office, which were all animated like the Boers, with contemptuous indifference to Indians who in their turn quietly submitted to military domination The deplorable conduct of Indians themselves in failing to assert themselves like the Japanese and Chinese strengthened the hands of the Boers and increased their racial arrogance The Boers might have had no obligations to Indians, but certainly the British Government owed it to themselves and His Majesty's Indian subjects to bring the Boers to their senses by effective pressure But it must at the same time be admitted that once responsible government was given it was difficult to control the policy of a self-governing Colony Such control was, moreover, not in accord with the spirit of the latest precedents

The creation of the Union in 1909, however, gave rise to new hopes Better things were expected from a responsible Government speaking for all South Africa It was also significant that a section was incorporated in the Act defining the powers of the Governor-General in Council in regard to the control and administration of native affairs† and of matters specially or differentially affecting Asiatics thoughout the Union Provisions

* Keith Responsible Government in the Dominions, Vol II, p 827

† Sec 147 *Cf* Sec 1 of the Native Administration Act (No 38 of 1927) which as amended by Sec 2 of Act 9 of 1929 reads as follows " The Governor-General shall be the supreme chief of all Natives in the Provinces of Natal, Transvaal and Orange Free State, and shall in any part of the said Provinces be vested with all such rights, immunities, powers and authorities in respect of all Natives as are vested in him in respect of Natives in the Province of Natal " The powers of the Supreme Chief are specified in the Natal Code of 1891.

for the control of the Governor General in Council were also made in connection with native locations and alienation of lands occupied by the natives The British Government ought to have in addition to the safeguards provided for in the Act, incorporated in the constitution a schedule of fundamental rights for European settlers and other races alike But in that case also the authorities in South Africa might have excluded Indians from the benefit of the schedule by restrictive laws and regulations regarding immigration, registration and deportation as they have actually done Indians and natives are however, entitled in law to the Governor General s support against discriminatory legislation designed to affect them, and here of course the Governor General s record does not seem to justify the hope raised when he was invested with extraordinary powers It is too much to expect that the Governor General of a Dominion will ordinarily follow a policy opposed by his responsible Ministers even if that policy comes under his special powers Full responsibility and safeguards cannot work in unison Sometime or other one must go under It should be remembered that Section 147 does not affect the legislative powers of the Union Parliament or of the Provincial Councils It refers only to the executive or administrative powers of the Governor General in Council which of course include the power to make regulations *

The Government of India s formula for solution of the problem

In 1910 the Government of India suggested a formula recommending promulgation of a general immigration law throughout the Union based on a language test abolition of barriers to inter provincial movement and removal of Indian grievances in Natal The formula was supplemented by a rider that the Union Government should permit annual immigration of a certain number of educated Indians The Government of South Africa agreed generally to all the proposals of the Government of India except that relating to the freedom of inter provincial movement † Nothing however was actually done to give effect to the terms

* Rex v Amod (1922) A D 217 Sdumba v Benoni Municipality (1925) T P D 290

† Parliamentary Papers cd. 5579 cd. 5593; cd 6283

of the agreement What is worse, in 1913 the Union Government passed an Act containing restrictive clauses humiliating to Indians and galling to their self-respect The immigrant was forced to pass through a writing and reading test in a European language including Yiddish and the Minister of the Interior was empowered to evict, expel and exclude any Indian on economic and social grounds The right of entry of wives and children of the immigrants was not at all considered unless the marriage was monogamous By that Act steps were immediately taken to exclude all Indians with few exceptions of minor importance

Kulsan Bibi's case and Mr Gandhi as a civil resister

The anti-Indian feeling then prevalent in the Union may be gauged from the refusal of admittance by the Union authorities to one Kulsan Bibi on the ground that under the Mahomedan law her husband could take in marriage three more wives, although there was nothing to prove that Kulsan Bibi was only one of the number of her husband's wives It was then that Mr Gandhi appeared on the scene and organised and led the first of those passive resistance movements which have made him a world-figure The Union Government replied by the employment of force and violence Mr Gandhi was arrested with a number of his colleagues and there was a considerable loss of Indian life But a Commission was at the same time appointed to enquire into Indian grievances Indians refused to co-operate with it The Commission, however, went into the question, submitted a report and made certain proposals * The Report provided a common meeting ground for Mr Gandhi and General Smuts

The Gandhi-Smuts agreement signed

An agreement known as the Gandhi-Smuts agreement was subsequently arrived at and a legislative measure was enacted in 1914 on the basis of the main provisions of that agreement The Act made provisions for the appointment of marriage registrars to perform marriages with monogamic effects, the registration *ex post facto* of marriages really monogamous, the free entry of wives and children of Indians who had no wives in the Union or

* Parliamentary Papers, cd 7265.

children by women still living and the abolition of the £3 tax It also gave power to the Government of South Africa to facilitate the repatriation of Indians and carry out the scheme of their total elimination But Mr Gandhi made it part of his understanding with General Smuts that the vested rights that Indians had created for themselves in the Union would be observed and respected—rights pertaining to residence, trade and free movement from one place to another in a township, with permission for one s successors in title to enjoy the same

The Imperial Conference takes up the question; a scheme of reciprocity between India and the Dominions recommended

The question of the treatment meted out to Indians in the Dominions was raised at the Imperial Conference of 1917 * It was agreed that there should be reciprocity between India and the Dominions in respect of immigration Both this country and the Dominions were entitled to prevent permanent settlement of immigrants but the entry into India or the Dominions as the case may be of such people for temporary purposes *viz* for the purposes of commerce and study was to be permitted In 1919 an Act† was passed in South Africa recognising and accepting the rights then in existence of every Indian trader carrying on business under license in proclaimed areas or on a stand or lot in a township These rights were extended to his successors In their case therefore a substantial part of the Gold and Township Acts was not applicable but care was taken so to interpret the Act of 1885 that there was left no room for evasion of its provisions The Act was made operative not only for the Indian settlers but also for companies in which one or more Asiatics had a controlling interest ‡

General Smuts protests against common citizenship of the Empire.

At the Imperial Conferences of 1921§ and 1923|| the problem was again raised It was laid down as a general principle that Indians resident in the Dominions should be treated as the Domi

* Parliamentary Papers cd. 8566
† Act No 37
‡ Madrassa Anjuman Islamia *v* Municipal Corporation of Johannesburg (1922) 1 A.C. 500.
§ Parliamentary Papers cd. 1474
|| *Ibid*, cd. 1988.

nions' citizens and as such be entitled to all the rights and privileges of citizenship In 1921 General Smuts fought hard and persistently against the resolution embodying that principle He fought again against the principle in 1923 with the result that the proceedings were enlivened by exchange of words between the gallant general and Sir Tej Bahadur Sapru The South African Prime Minister made it clear that he was not a believer in the doctrine of common Empire citizenship and of equality of rights between Indian and European settlers in the Dominions He declared, however, that the 'policy' in the Union was influenced by considerations of economic competition and not of race and colour

The consideration of the Union Class Areas Bill postponed, but the Colour Bar Bill placed on the statute book

Only a year later the Smuts Government introduced into the South African Parliament the Class Areas Bill for the purpose of segregating Indians in certain specified areas The Bill was lost in the Senate, but the Government persisted in their effort to deport as many Indians as possible and to have the Bill passed in the session of 1926 The Government of India raised their voice of protest and the Union Government responded by conceding that the Bill would be referred to a Select Committee before it passed the second reading In April the Union Government announced in the Parliament that the Bill would not be proceeded with in view of an understanding arrived at between them and the Indian Government * It was decided to hold a Round Table Conference in order to explore "all possible methods of settling the Asiatic question in South Africa on the basis of the maintenance of Western standards of life by just and legitimate means" The spirit shown by the Union Government in postponing the consideration of the Areas Reservation and Immigration and Registration (Further Provision) Bill was not preserved throughout, for there was still the Colour Bar Bill (the Mines and Works Act Amendment Bill) on the legislative anvil which was passed in the Assembly but rejected in the Senate and, on reference to the

* It was agreed at the Cape Town Conference of 1926 on the request of the Union Government that the Government of India would appoint an Agent General in the Union to secure continuous and effective co operation between the two Governments.

joint session of both the Houses was carried through by a fair majority One of the provisions of the Act thus passed was that in respect of some occupations defined in the Mines and Works Act of 1911 certificates of competence in certain areas and provinces should be granted only to Europeans and a few others specifically mentioned in the Act It was less offensive to Asiatics than in its earlier form inasmuch as the bar sections did not specify them by name It ought to be noted that in 1923 the Supreme Court decided that the regulations excluding coloured persons from certain rights under the Mines and Works Act, 1911 were *ultra vires* The court made it clear that any such discrimination based on colour was not contemplated by the legislature and would be unreasonable and even capricious and arbitrary * The Colour Bar Law was an amendment of the Mines and Works Act and the object of the amendment law was to extend the powers of the Government to issue regulations † The Colour Bar Act seems to have nullified the judicial verdict and the law was intended to confer upon the Government power to perpetuate discrimination From Indian standpoint it ought to be remembered that it was directed not so much against Indians as against native South African labour According to the definitions of terms‡ laid down in the Natives Taxation and Development Act of 1925 (No 41) and the Liquor Act of 1930 (No 30) the Act apparently did not apply to Asiatics at all But there was no safeguard against possible misinterpretations of its provisions to the prejudice of the Indians

The Capetown Agreement.

The Conference between the representatives of the Union and the Indian Government was held in December, 1926 and its labours were concluded in January 1927 An Agreement was reached

* J H Harris Slavery or Sacred Trust p. 60

† Delisle Burns A Short History of the World 1918-1928 p 374

‡ A Native means a member of an aboriginal race or tribe in the Union and includes a bushman a Hottentot and an American negro. A coloured person is one who is not entirely European or entirely native and excludes an Asiatic but includes those known as Cape Malays. Coloured or non European races applies to all persons who are not European or white Mark the difference between coloured persons and coloured races With the exception of Cape Malays coloured persons does not include Asiatics but refers to persons of mixed European and native blood while the coloured races includes Indians Chinese Japanese, etc

of which both the Governments approved and the results were announced by Dr. Malan, Minister for the Interior, on the floor of the Union Assembly. This agreement is known as the Cape Town agreement. According to it, the claim to South African settlement was abandoned by those Indians who were not prepared to imbibe and conform to Western standards of life and civilisation. The Union Government in their turn agreed to admit those Indians, who were so prepared, to the Union franchise and give them all necessary facilities in that behalf. A scheme of repatriation was drawn up for other Indians and the Government of India held out the assurance that they would look after the immigrants from South Africa. The Union Government undertook to give financial assistance to those Indians who were prepared to leave their jurisdiction. It was further laid down that after three years' continuous absence Indians from South Africa would lose their Dominion domicile and *pari passu* their right to admission to South Africa.* Those who were anxious to retain their domicile could do so provided they refunded the cost incurred by the Union for their assistance. Permanent Indian residents in the Union were entitled to get their wives by monogamous marriage and their minor children admitted to its territory. The Areas Reservation Bill was dropped. Neither party was bound by the agreement for any definite period of time. It was a temporary measure adapted to a temporary purpose so that each of the contracting parties was at liberty to break it, if and when the occasion arose.

The Transvaal Asiatic Land Tenure Bill introduced to hurt Indians, a Select Committee to go into the problem

Despite the Cape Town agreement, Dr. Malan, Minister for the Interior in the Hertzog Government, introduced into the Union Legislative Assembly, a Bill called the Transvaal Asiatic Land Tenure Bill. The main object of the Bill was stated to give effect to the laws already in existence in South Africa. A series of laws, namely, the Law

* By Sec. 10 of the Immigration and Indian Relief (Further Provision) Act of 1927 (Act No. 37) domicile in the Union is deemed to be lost by an Asiatic if he absents himself from the Union and does not re-enter it within three years from the date of departure therefrom.

of 1885, the Gold laws of 1898 and 1908 and Act No 37 of 1919 had been passed to prevent Indians from acquiring ownership of land or leasing land for trading in mining areas The new measure was an attempt to co-ordinate old legislation to nullify the decisions of the Court and to prevent evasion of the restrictive clauses of the Acts by Asiatics It sought to prevent the future acquisition of fixed property in ownership by Asiatics in the Transvaal outside the specified areas and the occupation of land in mining areas and empowered the local authorities to refuse to issue, on certain conditions, trading licenses to the Asiatics The Select Committee which was appointed by order of the Union Assembly dated February 3 and 5 1930 pointed out in its report that it had been called upon to deal more specifically with three distinct problems viewed in the light of the Supreme Court judgment The first concerned the position which had arisen as a result of the issue of trading licenses to Asiatics in illegal occupation of stands either on proclaimed land or in Government or private townships under covenants prohibiting occupation by coloured peoples other than those in domestic employment The second concerned the position arising from areas such as Springs, the larger portion of which had been proclaimed a public digging subsequent to the promulgation of Act No 35 of 1908, but to which the restrictions contained in Sections 130 and 131 of that Act did not apply owing to the fact that the Supreme Court had ruled that *erf township* had been established prior to such proclamation The third concerned the frustration of Act No 37 of 1919 in so far as it had been intended to prohibit the ownership of fixed property in the Transvaal by Asiatics through companies in which they had a controlling interest

The Select Committee's recommendations.

The Select Committee recommended *inter alia* ' that a period of five years commencing on May 1 1930, shall be fixed within which all the legal business shall be disposed of that a list of all businesses carried on illegally shall be compiled by means of voluntary registration within a specified period and that any such business not registered as indicated shall forfeit all rights to temporary protection It was further recommended that a register of all businesses protected by Section 1 of Act No 37 of 1919, be also

compiled" The Committee then went on to add "that the local authorities concerned shall, within twelve months after the promulgation of the legislation proposed, assign suitable areas approved by the Minister, in which the Asiatics affected will be enabled to obtain trade facilities and ownership of fixed property on reasonable terms" It pointed out also that no future legislation would prove to be effective unless adequate machinery was provided for the purpose of ensuring the enforcement of the law, and proposed that "local authorities" should be given power to refuse certificates for licenses unless the applicant proves that he is lawfully entitled to occupy the premises on which the business is to be conducted

The Bill opposed in India and an agreement reached

The Bill provoked a storm of protest in India and from the Indian community in South Africa Representations were made by the Government of India to His Majesty's Government in the United Kingdom and the Union Government As a result a Round Table Conference was arranged between the representatives of the Government of India and the Union Government which met at Cape Town in 1932 The Conference produced an agreement between the two parties the terms of which were read out in the Council of State and the Legislative Assembly on the 5th April, 1932

The agreement provides for a scheme of repatriation

The agreement divides itself into two parts, the first relating to the Cape Town agreement of 1927 and the other to the Asiatic Tenure Bill It was admitted in the agreement that the possibilities of the Union Government's scheme of assisted emigration to India were now practically exhausted owing to the economic and climatic conditions of this country as well as to the fact that 80 per cent of the Indian population of the Union are now South African born In consequence the Government of India would co-operate with the Government of the Union in exploring the possibilities of a Colonisation scheme for settling Indians, both born Indian and born South African, in other countries A thorough investigation was to be undertaken in connection with the scheme in the course of the year with which a representative of the Indian community in South Africa would,

if they so desired be associated After the investigation was over the two Governments would consider the results of the enquiry No other modification of the Cape Town agreement of 1927 was considered necessary at the Round Table Conference

Certain clauses of the Land Tenure Bill deleted.

As regards the Asiatic Tenure Bill, Clause 5 which embodies the principle of segregation by providing for the earmarking of areas for occupation or ownership of land by Asiatics, has been deleted Instead the Gold Law is to be amended to empower the Minister of the Interior in consultation with the Minister of Mines to withdraw any land from the operation of Sections 130 and 131 in so far as they prohibit residence upon or occupation of any land by coloured races This power will be exercised after enquiry into the individual cases by an impartial Commission presided over by a judge to validate the present illegal occupations and to permit of exceptions being made in future from the occupational restrictions of the Gold Law The Bill has also been amended so as to protect the fixed property acquired by Asiatic companies up to March 1 1930 which are not protected by Section 2 of Act No 37 of 1919 The local bodies which are authorised under clause 10 of the Bill to refuse certificates of fitness to an Asiatic to trade on the ground that the applicant may not lawfully carry on business on the premises for which license is sought shall have to treat a certificate issued by a competent Government officer to the effect that any land has been withdrawn from the restrictive provisions of Sections 130 and 131 of the Gold Law as furnishing sufficient proof that a member of the coloured races may lawfully trade in such lands It is proposed to maintain hereafter a register of all lands in the proclaimed areas where Asiatic occupation is permitted The recommendation of the Indian delegation to the effect that areas like Springs and proclaimed lands to which restrictions of Sections 130 and 131 do not at present apply should not be brought within their purview and that leases for ten years or more should not be treated as fixed property has not been accepted

Mr Andrews analysis of the Agreement

Mr C F Andrews who has studied the South African problem with thoroughness and care points out that the chief gain has been a

frank acknowledgment by both the Governments that repatriation has proved a failure and that complete withdrawal of Clause 5 of the Land Tenure Bill has now definitely prevented segregation.* Besides, Mr. Andrews considers that substantial gains have been secured, from the Indian point of view, such as the protection of property rights up to May 1930, and denial to municipalities of the right of refusal of trade licenses. "At the same time," he observes, "it is a loss that when the mining areas are deproclaimed so as to pass back into ordinary lands the old evil of racial disabilities would continue While this will not severely hurt Indian traders who usually seek mining areas for trade, yet it is an extension of the colour bar which should call for strong protest from the Indian Government" "It is also very regretable," he adds, "that nothing has been done in the agreement to restore to their full value Transvaal Registration certificates"

The amended Bill passed in the Union

The Transvaal Asiatic Tenure Bill was duly passed by the South African legislature It embodies the modifications agreed to by the Union Government including the deletion of clauses regarding segregation and ownership of property and other amendments in the original law to which exception had been taken by the resident Indian community The fixed property, which stood lawfully registered in favour of any Asiatics up to May 1, 1930, has been protected, the restriction that it would remain protected only so long as it was held by him or by any other Asiatic who inherited it from him, having been withdrawn Properties held through European Trustees or acquired by an Asiatic company up to May 1, 1930, have also been safeguarded Protection has further been granted to all shares which were held by an Asiatic on May 1, 1932, and have not been transferred by him since that date and also to such shares as have been inherited by an Asiatic from another Asiatic who lawfully held them

Further amendments of the Act in 1936

A further step was taken in 1936 The new measure has amended not only the provisions of the Transvaal Asiatic Law Tenure Act of 1932 but in many respects all identical

* The Calcutta *Statesman*, dated 6th April, 1932

laws enacted since 1885 It has adopted the proposals of the Feetham Commission for the exemption of (i) certain blocks of land and (ii) certain persons or individual holdings from the old laws preventing occupation by Asiatics It further provides that Asiatics resident in blocks where under the Act such occupation is permitted shall enjoy the right of ownership in perpetuity The exemption in the case of blocks will be subject to the approval of the Union Parliament and that in the case of individuals the power is vested in the Minister concerned without Parliamentary sanction What is clear is that although the Act is a substantial improvement on the present state of things segregation on grounds of colour or race is not completely ruled out Besides, legislation is one thing and administration of the law is another and it is yet to be seen if the Union Parliament or the Minister in Charge as the case may be acts in the matter of exemption in conformity with the spirit and the letter of the law * It should be noted that while welcoming the measure Sir Syed Raza Ali the Government of India s present Agent-General in South Africa warned British Indians in July 1936 that the centre of political action was now transferred to the Transvaal and Natal, and instanced the attempts of the Natal Municipal Association to create residential and business segregation

A Departmental Committee appointed

Now on the 15th of June 1932 the Minister of the Interior of the Union Government announced in the Assembly the appointment of a Departmental Committee of four members to consider a scheme of colonization in other countries for Indians South African born and Indian born in accordance with the terms of the Cape Town agreement of 1932 He added that the South African Indian community would be represented on the Committee the appointment of which had the concurrence of the Indian Government On the same date a *communique* was issued from Simla explaining the position which had arisen and informing the Union

* *Apropo* of the proposals of the Johannesburg City Council as regards the Gold Mine Area the Transvaal Asiatic Land Tenure Act Commission recommended in 1930 that in respect of individuals residing outside the exempted areas the sites now occupied should be exempted if occupation began from May 1930 and if occupation began between May 1930 and June 1932 it should be allowed to continue for life or for a fixed period.

Government that the Agent of the Governor-General of India and his staff would be at the disposal of the Union Government and the Committee set up for giving such informal help as might lie in their power It was stated in the *communique* that the recommendations of the Committee would in due course be communicated to the Government of India for consideration and that no decision as regards the countries where such exploration should be undertaken or the personnel or terms of reference of the Commission, to which such investigation as decided upon should be entrusted, would be taken until the recommendations of the Committee appointed by the Union Government had been fully considered by the Government of India

India's right to seek outlet for her surplus population

The report of the Inquiry Committee was released in July, 1934 The Committee have expressed themselves in favour of a large land settlement scheme to be financed by both the Indian and Union Governments, or the creation overseas of an Indian colony to be developed chiefly by Indian enterprise British North Borneo, New Guiana and British Guiana have been suggested as possible colonies for Indians, and the Committee add that the British North Borneo Company are prepared to negotiate for the transfer of that settlement's sovereignty to the Government of India or to an Indian Chartered Company There is one significant statement made by the Committee and it is that India with her evergrowing population has a right, from an economic point of view, to seek outlet for the surplus population of her congested areas, and to obtain a colony as other countries Hitherto, however, India's nationals have gone abroad as indentured labourers to develop colonies of other peoples and have for the most part remained outside the circle of citizenship in their new homes A position like that is humiliating not only to themselves but to India and it is time the Government of India strove earnestly to remove it The details of the scheme of repatriation formulated by the Young Committee are not strictly relevant to the subject of our study in this work Suffice it, however, to say that the scheme has practically broken down and that the South African Indian Congress is opposed to it What requires to be emphasised is that there is absolutely no reason for driving out Indians from

a colony, which they have built up by their labours and which they rightly claim as their land of adoption, or for depriving them in that colony of the elementary rights of citizenship Whether or no Indians settled in the Union and their children should leave the land and develop a new colony is a question which should be left to them There is no reason why the white people should be allowed to dictate policy in such a matter On moral grounds South African born Indians have the same right as the white settlers to remain in the Union

Indian disabilities in the self-governing Dominions.

To sum up the anti Asiatic laws, regulations and ordinances promulgated in different parts of the Dominions, particularly in South Africa prove to demonstration that Indians resident and engaged in business there are not treated on terms of equality with the white settlers who control the machinery of Government In some of the Provinces or States Indians have been subjected to drastic economic regulations Indians as such are not treated automatically as nationals in the Dominions and as a matter of fact in this respect they are in no way accorded a better position than other Asiatics or foreigners although British Indians are in law His Majesty s subjects in all parts of the Empire notwithstanding the fact that the Dominion of Canada the Union of South Africa and the Irish Free State have by their own laws evolved distinct types of their own citizenship In the Union of South Africa Indians are still treated on terms which are characterised by a narrow outlook and in the matter of immigration they enjoy less privilege than do the Japanese under an Agreement of 1930 Generally Indians are subjected to all the restrictions imposed upon the natives * and in addition stringent measures have been taken apparently to prevent evasions of the law by them Reference for instance may be made to the Transvaal Land Tenure Act (No 35) of 1932 which provided heavy penalties for persons holding shares or land in trust for Asiatics That law has however been amended with the result that Indians are at present distinctly in a better position than before In the other Dominions the problem is not so acute as

* See Chap X *supra* pp 301-02.

in the Union. Of course immigration is regulated and considerably shut off, and the Dominion of Canada metes out better treatment to Japanese than to Indians * Up to 150† a year newcomers from Japan are permitted entry into the Dominion while Indians are entirely excluded save for mere visits; nor has Canada been able to persuade British Columbia to accord Indians there the right of franchise, which has resulted in their exclusion from the Federal franchise also It appears that serious problems like those in South Africa have not arisen there largely on account of the fact that the number of Indians resident in Canada is small The position in the Commonwealth of Australia generally is not very much different from that in the Dominion But the Commonwealth and Queensland have extended the right to vote to their Indian residents, and at the Federal Centre they are entitled to draw Old Age Pensions In New Zealand also a policy of rigid exclusion is followed under Acts of 1920 and 1931 In the Irish Free State as in Great Britain there is no restriction on freedom of entry but unlike in Great Britain the franchise is restricted to Irish citizens as defined in Art 3 of the Constitution and in subsequent legislation

The position unsatisfactory

The position of Indians, on the whole, in the Dominions is not satisfactory Dominion policy in that regard may be viewed from two aspects It seeks, in the first place, to shut off effectively any serious Indian immigration Secondly, what affords a more glaring instance of discrimination, the treatment accorded to Indians legally settled there is extremely unsatisfactory No attempt has been spared to discriminate against even British ships trading with the Dominions which carry lascar crews The acute controversies that have often arisen regarding their status have not yet gone beyond the limits of Municipal or inter-Imperial law But it is just possible that some day the issue may be raised before the League Council or the Permanent Court of International

* It has been held in Attorney General of British Columbia v Attorney General of Canada (1924) that the legislation of the Federal Centre giving effect to the Treaty with Japan supersedes Provincial legislation seeking to prevent Japanese from working under timber licenses issued by the Government

† Under an informal accord with Japan

Justice, for it is held by an influential section of opinion in the world that the right of migration ought to come within the purview of the League of Nations, and in mobilising that opinion Japan has spared no pains She has never acquiesced in the justice of the policy of reservation of areas by nations as their inviolable preserves especially when as in the case of Australia the local population and such immigration as it permits fail to fill up the territory on any adequate scale

India's statutory right to retaliate against Dominions

Whatever might be the ultimate effect of the recent trend of opinion, there is no doubt that the anti Indian policy pursued in the Dominions has already undermined the foundations of inter Imperial relations It ought to be mentioned that at Ottawa while the Indian Delegation adopted the principle of preferential treatment for British goods no such agreement could be made between India and the Dominions This is a fact which Dominion statesmen as well as the authorities in Whitehall should seriously ponder Efforts have however been made from time to time to improve the political status of Indians thanks to the labours of the successive Imperial Conferences and the Gandhi Smuts Agreement the Cape Town Agreement and the recently signed Agreement are steps in that direction * But despite some salutary changes three points emerge clear first the Dominions have established the principle that common British citizenship does not carry with it common rights and privileges secondly they have the right to keep out Indians from their territories by immigration laws and to impose upon those already admitted economic and political restrictions and thirdly the Crown and its representatives cannot be utilised for the purposes of Indian protection in a self governing Dominion having regard to new developments in status as well as in functions But it is a matter for satisfaction that India both at the Centre and in the Provinces † has been left free under the Government

* It is expected that the Hofmeyr good will delegation that came out to India in 1930 will pave the way t friendlier relation between the two countries in political and economic spheres It was not a political tour but social contacts may result in legislation in the desirable direction

† *Cf* Chapter III of Part V of 25 & 26 Geo. 5 c. 40

of India Act of 1935 to retaliate against the nationals of those Dominions which discriminate in legislation and administration to the prejudice of British Indians either already settled or anxious to gain entry there That power may be exercised against any part of the Empire save the United Kingdom for which adequate and effective safeguards have been provided Its value, however, from a practical standpoint is not great in view of the fact that Dominion immigration into British India is in no sense a serious problem, but advantage may be taken of it in restricting or controlling their trade with her It indicates a healthy and perhaps a new phase in India's status in the constitutional law of the Empire which may flatter nationalist Indian sentiment

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Part III

CHAPTER XII.

The Indian Problem

The problem of minorities in India is much more vast and complex than the problem in the European States or America or any other part of the world There are in this country, including British India and the Indian States out of a total of over 319 000 000 inhabitants about 217 000 000 of Hindus 69 000 000 of Mahomedans 11 000 000 of Buddhists, 5 000 000 of Christians and 3 250,000 of Sikhs concentrated mainly in the Punjab * The figures indicate not only the vastness of the total population but the differences which divide it into numerous religious sects or communities

The multiplicity of interests

That however is not the whole picture India includes as is well known, the British territories and the Indian States which enjoy generally and as a whole a very large measure of administrative independence The relations between these States and the Crown have been determined by the Treaties and *Sanads* which are claimed by the Princes to be inviolable and also to a considerable extent by the declarations made by the King's agents in India from time to time on the position and status of each individual State † By the Government of India Act, 1919, British India again was divided into nine major Provinces and a number of other administrative units ‡ Under the Act of 1935

* The figures quoted above are based on the census of 1921. The present population in British India including Burma is as follows :—Hindus—239,195,140 Muslims—77,677,545 Buddhists—12 786,806; Tribal—8,280,347; Christians—6,296 763; Sikhs—4,335 771 Jains—1,252,105 Zoroastrians—100 762 Jews—24,141. (Census of India 1931: Abstract published by the Government of India)

† *Cf* Lord Reading's letter to the Nizam dated the 27th March 1926 and Report of the Indian States Committee 1928-29

‡ The North-West Frontier Province was subsequently constituted into a Governor's Province and dyarchy introduced under the Reforms Act 1919

the number of the Governors' Provinces has been raised to eleven with other units of subordinate constitutional status such as the Chief Commissioners' Provinces, and Burma has been separated from India * Besides, the population is not distributed evenly or according to its linguistic, religious or racial characteristics The Mahomedans who form a considerable minority claiming 77,049,868 of the total population in the country excluding Burma are in the majority in Bengal and in the Punjab, in North-West Frontier Province and Sind In the Punjab the Muslims number 13,302,991 out of a total of 23,551,210 and in Bengal 27,497,624 out of a total of 50,114,002 In other Provinces they are in a minority ranging from 33 per cent in Assam to a little over 7 per cent in Madras Again in the Central Provinces they are a little over half a million out of a total population of fifteen millions and almost similar is their numerical strength in Burma also Among the Hindus again there are a large number of castes and sub-castes There are millions who call themselves Hindus but who are excluded from the social rights and privileges of the caste Hindus The Mahomedans also are divided into two principal sects, namely, the Shias and the Shunnis Among the Christians there are the natives, the Anglo-Indians and a large number of Europeans doing business in India or otherwise engaged Above all, the size of the country is not only abnormally large but perhaps also formidable for one central controlling authority

Now, the Simon Commission have quoted extensively from the Census Report of 1921 which states .

The bed-rock of "indigenous" India

"Except perhaps to the few who understand its philosophical meaning Hinduism has no one distinguishing central concept Superimposed on a heterogeneous people differing widely from one another in race, language and social traditions and interests, the vagueness and elasticity of its system, and the protean form of its mythology, its ceremonies and its ordinances have enabled it to absorb and overlap the various animistic systems which it encountered "†

* Ss 46 & 94 and the Burma Act

† Report on Census of India, 1921, Vol I, p 108.

The Commission then express their own view on the subject by stating that Hinduism counts as its adherents more than two-thirds of the inhabitants of India and within its comprehensive embrace includes much that might seem to outside observers to be contradictory * They do not stop there for they add that the learned and subtle Brahmin of Benares may seem to have nothing in common with the untouchables of Dravidian stock living in the *parcherries* of Madras city who are nevertheless included within the fold of Hinduism while being denied access to its shrines † But they have the fairness to admit that in spite of seeming differences all alike are caught up in this marvellous system so ancient and so persistent, which is the bed rock of indigenous India ‡ The Commission s views on the Hindu Muslim differences are far more sweeping Dispersed as they say among the 216 millions of Hindus of India are nearly 70 million representatives of a widely different type of culture not originally or exclusively Indian but spread throughout India as the consequence of a series of invasions from the North and West which have taken place in historic times § They proceed to add that it would be an utter misapprehension to suppose that Hindu Moslem antagonism is analogous to the separation between religious denominations in contemporary Europe Differences of race a different system of law and the absence of inter marriage constitute a far more effective barrier It is a basic opposition manifesting itself at every turn in social custom and economic competition as well as in mutual religious antipathy ||

Lord Birkenhead s gibe at national unity

According to Lord Birkendead, just as Europe has never become a single nation and is divided into many separate and often antagonistic peoples so India comprises in a far greater degree a heterogeneous population riddled by differences of race religion caste interests and sect ¶ Is there the slightest chance he

* Simon Commission Report Vol. I p 24

† *Ibid*

‡ *Ibid*

§ *Ibid*

|| *Ibid* p 25

¶ Birkenhead s Last Essays Essay on the Peril to India p 40

asks, "that any Indian Government could possibly maintain peace and order among these various peoples?" His Lordship himself gave the answer which reads as follows

> "No matter how glibly a few seditionists on political platforms may declare the unanimity of Hindu and Mahomedan aspirations the vast bulk of the people of India knows nothing of such unity These populations live in a state of perpetual hostility, the manifestations of which are, and can only be, suppressed by the firm action of the British authorities"*

"The gulf impassable," says Mr Churchill

Mr Winston Churchill, a friend of Lord Birkenhead and his colleague in the Conservative Government, goes one better He says "while the Hindu elaborates his arguments, the Muslim sharpens his sword The gulf is impassable If you took the antagonism of France and Germany, and the antagonism of Catholics and Protestants, and compounded them and multiplied them tenfold, you would not equal division which separates these two races intermingled by scores of millions in the cities and plains of India But over both of them the impartial reign of Britain has hitherto lifted its appeasing sceptre"†

Indians realise the difficulties but they are often exaggerated

That there are differences, religious, linguistic and racial, dividing as it does the peoples of India, is admitted on all hands and even by the spokesmen of the Congress, those rank "seditionists," whom Lord Birkenhead found using every political platform and talking "glibly" of common Hindu-Moslem aspirations The Report of the Committee appointed by the All Parties' Conference, which was signed amongst others by Pandit Motilal Nehru and Sir Tej Bahadur Sapru, while recognising those differences observed that "the communal problem of India is primarily the Hindu-Muslim problem Other communities have, however, latterly taken up an aggressive attitude and have demanded special rights and privileges The Sikhs in the Punjab are an important and well-knit minority which cannot be

* Birkenhead's Last Essays, pp 40 41

† Mr Winston Churchill's speech at a meeting held on the 18th March, 1931, at Albert Hall under the auspices of Indian Empire Society

ignored Amongst the Hindus themselves there is occasional friction especially in the South between non Brahmins and Brahmins But essentially the problem is how to adjust the differences between the Hindus and Muslims * That the Indian nationalists have never ignored the importance of the problem is further proved by their prolonged negotiations for the last few years with the leaders of different communities which culminated in the evolution of the Congress formula for the settlement of the communal controversy † To admit the importance of the problem is not necessarily to follow the line of argument advanced by the school of British politicians headed by Mr Churchill They seem to have over-emphasised the differences forgetting altogether that behind a variety of races and of languages there may be a definite and visible background of unity of thought and action in all the basic problems of government

Essentials of national unity

A great thinker and writer‡ has said that the factors making for nationality are (1) identity of descent (2) community of language and religion (3) geographical limits and (4) identity of political antecedents Delisle Burns observes that besides mere physical relationships we are to reckon with the unity of a tradition A common memory he adds and a common ideal—these more than common blood—make a nation § It is interesting here to recall the words of a great English statesman uttered in connection with Home Rule for Ireland He said Will anyone have the hardihood to deny that the Scots are a nation? They are not all be it remembered of one race They are both Celts and Saxons They are not all of one religion, and they are not by any means of one way of thinking about the problems of life spiritual intellectual or material and yet no one will deny that the Scots are a nation Judged by any test that you can apply the Irish is as definite and as separate a nationality as the

* Nehru Report Chap. II p. 27

† That Congress formula was eventually repudiated by large sections of Moslem opinion.

‡ John Stuart Mill.

§ Delisle Burns: Political Ideals Chapter on Modern Nationalism, p. 178.

Scots "* The essential factor of nationality, therefore, is a common political consciousness and a common ideal It is doubtless true that common blood tends to give rise to that factor, blood, as they say, is thicker than water.

Unity of political outlook

History has demonstrably proved that nationalism may grow and develop among peoples differing from one another in race, language and religion Had it not been so, Switzerland would not have been what it is to-day working out a common national programme under a confederation, the States of America could not have combined their forces and established a Federal Commonwealth, Canada would have been cut asunder into separate independent States distracted by religious, linguistic and racial animosities, and last but not least, the British nation, instead of forming a common Government in Whitehall, would have divided themselves into a separate English State, a separate Scottish State and a separate Welsh State Is that common political consciousness discernible in India? Or is it lacking? Beneath the seeming differences there is a unity of political outlook among all classes of the Indian people, thanks to the spread of English education and the easy facilities of communication between one part of the country and another and the setting up by the British people of a central machinery of government in India They are united, for example, in their demand for an Indian Swaraj to be controlled by them and for their benefit To compare the Indian Provinces with the independent European States and the Indian peoples with the European races is, therefore, to ignore history and the significance of recent political developments Politically and administratively, Europe has hardly ever been like India

Legitimate interests of minorities require protection.

But at the same time there can be no denying the fact that there are large and important minorities in the country whose legitimate interests ought to be effectively safeguarded and who ought to be given an opportunity, as

* Mr Asquith's speech on Home Rule for Ireland, Theatre Royal, Dublin, July 19, 1912

far as possible, to associate themselves actively with the administration The transfer of political power must be made not to any particular community but to the people as a whole if any scheme of responsible government is to prove a success How then are the minorities to be protected without impairing the solidarity of the nation and striking at the roots of responsible national democracy?

Various parties press their demands

Detailed and specific proposals for the protection of the rights of the various minorities in India have emanated from different sources The principal among them are (1) The All India Moslem Conference led by His Highness the Aga Khan (2) The nationalist Moslem organisation led by Dr Ansari and Moulana Abul Kalam Azad both of whom have been members of the Congress Working Committee (3) The Hindu Mahasabha of which the spokesmen are Dr M S Moonje and Bhai Paramanand (4) a deputation of Sikhs in the Punjab which waited upon His Excellency Lord Willingdon on July 9 1931 (5) the depressed classes whom Dr Ambedkar was nominated to represent at the Round Table Conferences (6) the Indian Buddhist community who submitted a memorial to Mr Gandhi during the Congress session at Karachi in 1931 (7) the European community doing business or otherwise engaged in India for whom Sir Hubert Carr and later Sir Edward Benthall spoke at the Round Table Conferences (8) the Indian National Congress and (9) a group representing jointly Muslims depressed classes Indian Christians Anglo-Indians and Europeans

The case for the Muslims.

Briefly put the orthodox Muslims represented by His Highness the Aga Khan* insisted on separate electorates a statutory majority for Muslims in the Bengal and Punjab legislatures through separate electorates weightage in the Provinces where they are in a minority and also in the Central legislature, the constitution of Sind into a separate Province the introduction of Reforms in the North

* See the proposals of the All India Muslim Conference.

West Frontier Province and Beluchistan as in other Provinces, adequate representation of Muslims in the Central and Provincial Cabinets and Public Services and in the public bodies, a uniform measure of autonomy for all the Provinces and the vesting of residuary powers not in the Central Government but in the Provincial administrations They demanded further that no territorial redistribution should affect the Muslim majority in Bengal, the Punjab and the North-West Frontier Province and that full religious liberty should be guaranteed to all communities Mr M A Jinnah's now famous fourteen points were embodied in these demands

The nationalist Muslim platform

The Nationalist Muslims* agreed with the rival Muslim group in regard to weighted representation at the centre and the vesting of residuary powers in the federal units and provisions regarding Sind, the North-West Frontier Province and Beluchistan But they insisted on joint electorates and adult suffrage, reservation of seats in the Provinvial legislatures for minorities who formed less than 25 per cent of the total population and representation of their interests in Cabinets and Public Services consistently with efficiency

Views of the Hindu Mahasabha

The Hindu Mahasabha† proposed the adoption of the principles of minorities protection evolved under the League of Nations and demanded joint electorates, and protested against reservation of seats and weightage and protection for the majority in any form or shape They proposed further that the residuary powers should be exercised by the Federal Centre and that no territorial redistribution of the Provinces should take place without a thorough enquiry by an impartial and expert Boundaries Commission into linguistic, administrative, financial and strategic considerations involved In their view the franchise should be uniform and no discrimination should be observed in making public appointments

* See the proceedings of the Nationalist Muslim Conference at Faridpur, 1931

† See the Mahasabha memorandum,

The demands of the Sikhs.

The Sikhs* were opposed to a statutary communal majority and reservation of seats for a majority community They wanted reservation of seats for them in the Central legislature and representation of their interests in Cabinets and Public Services, and also in the Army Council should any such Council be constituted, and in the Public Services Commission They demanded that the Punjab should be reconstituted to restore communal balance failing which the Province should be centrally administrated until an agreement was reached among the communities concerned and that weightage should be provided for the Sikhs in other Provinces as in the case of other minorities According to them the Central Government should enjoy residury powers and be empowered to protect the rights and interests of the minorities

The Buddhists against communalism

The Buddhists† demanded that at least two seats in the Bengal Legislative Council and one seat in the Central Legislature should be reserved for them that there should be joint electorates with reservation of seats and that proper safeguards for the interests of the small minorities should be incorporated in the constitution They were prepared however to waive all communal claims should the communal question be not at all considered

The depressed classes against social wrongs

The main plank in the depressed classes platform‡ consisted in the demand for a guarantee protecting them against social injustice and tyranny—those social disabilities and discriminations to which they had been subjected for ages They proposed that they should enjoy the right of appeal to the Central Government or the Secretary of State against acts of negligence calculated to affect their interests prejudicially and that a Special Department should be created to promote their welfare They were not opposed to joint electorates with reservation of seats provided adult suffrage was established but failing adult suffrage they would have separate

* See the scheme of the Sikhs deputation on Lord Willingdon.

† See the Buddhists letter to Mahatma Gandhi

‡ See the memorandum by Dr Ambedkar and Mr Srinivasam before the Round Table Conferences The depressed classes are now statutorily termed the scheduled castes.

electorates for themselves. It was their desire that they should be treated separately from the caste Hindus in the matter of representation and that the principle of weightage should be accepted for the minorities on grounds of educational backwardness and economic inefficiency. They insisted on representation being accorded to them in the Executive Government and the Public Services.

The European community against commercial discrimination

The European community* in India demanded separate electorates for them, safeguards against discriminatory legislation prejudicially affecting their interests and the maintenance intact of the rights and privileges in criminal law they had hitherto enjoyed.

The Congress attempts a compromise

The Congress scheme† emphasised the need and desirability of joint electorates and adult suffrage for all classes of people irrespective of their class, creed, colour or economic efficiency. It proposed reservation of seats on the basis of population for the Hindus in Sind, the Muslims in Assam and the Sikhs in the Punjab and for Hindus and Muslims in any Province where they were less than 25 per cent of the total population, with a right to contest additional seats on the part of such minorities. Mahatma Gandhi added a rider to the Congress electoral scheme and suggested that, wherever possible, the electoral areas should be so determined as to enable every community to secure its proportionate share in the legislature. Under the Congress scheme a convention was proposed for the purpose of associating the minorities with the Cabinets, Federal and Provincial. Consistently with effeciency public appointments should be made by a non-party Commission having regard to the claims of each minority community, and the residuary powers should be vested in the federal units unless such an arrangement was found, on further examination, against the best interests of the country. It accepted the Muslim demand that constitutional Reforms should be introduced into the North-

* See Sir Hubert Carr's speech before the Minorities Sub Committee of the Round Table Conference.

† See the Congress scheme circulated by Mahatma Gandhi among the Round Table Conference delegates.

West Frontier Province and Beluchistan as in other Provinces It had no objection to Sind being constituted into a separate Province provided the people thereof agreed to bear the burden of financial responsibilities of a Governor s Province

A comprehensive list in the Minorities Pact

The proposals separately put forward by Muslims Depressed classes Indian Christians * Anglo-Indians and Europeans should be read in the light and spirit of their demands made jointly by them in a comprehensive agreement known as the Minorities Pact † The first six clauses of the Pact deal with what might be called the fundamental rights and with the right of the minorities to establish manage and control at their own expense charitable religious and social institutions and schools and other educational establishments and with the allocation of public funds to schools and other institutions of the minorities It insisted on separate electorates with reservation of seats for the minorities and suggested a statutory Muslim majority in Bengal and the Punjab Separate electorates might be replaced by joint electorates with the consent of the minorities concerned after ten years in the case of the Muslims and other minorities, and after twenty years in the case of the depressed classes It further laid down that the Muslims and other minorities of considerable size should be represented in the Cabinets both Federal and Provincial and that convention to that effect should be established and that the recruitment to Public Services should secure a fair representation of the minorities consistently with the considerations of efficiency and the possession of necessary qualifications The Pact then proceeded to deal with the special demands made by Muslims depressed classes Anglo-Indians and the European community and accepted them practically in every detail

Various demands grouped under two main heads

What is definite and clear is that although there are acute differences of opinion among different sections of the people regarding special rights for minorities they are all agreed that the Constitution should embody a charter of fundamental

* Mr S K. Dutta a representative of the Ind an Christ ans at the Round Table C n erence submitted a note of dissent to the Conference

† See the Minorities Pact placed before the Second Round Table Conference

rights guaranteeing effective protection of life, liberty and religion The demands put forward by these different groups might be broadly and roughly grouped under two main heads, namely, (1) certain general principles of the Constitution guaranteeing fundamental rights to the citizens and providing protection against any possible discrimination in political, economic and religious matters on grounds of race, caste, creed, or colour, and (2) certain clauses in the Constitution for the special protection of particular minorities To the second head belonged the proposals relating to the system of electorates, weightage in the Federal and Provincial legislatures, representation of minorities in the Cabinets and Public Services, allocation of public funds for the benefit of minorities, territorial redistribution of Provinces, vesting of residuary powers, protection clauses for European commerce and retention of the existing privileges of the European community in criminal law

No definition of "minority" in schemes of protection

It is to be noted that the discussion of the problem throughout proceeded on rather unscientific lines No serious attempt was made either in the *pourparlers* among Indian leaders or in the Round Table proceedings to define "minority" before proceeding to consider the nature and extent of protection sought to be extended to them In the country as a whole a community might be a minority from the numerical standpoint, but that minority might be a majority in any particular Province The Mahomedans, for example, constitute a minority in India while, they are in a majority in Bengal, the Punjab, the North-West Frontier Province and the newly created Province of Sind Viewed as an Indian question, the Mahomedans are certainly entitled to adequate and legitimate safeguards but not with reference to those Provinces, save on grounds of their general backwardness, particularly when the Constitution adopted is of a Federal type Nor was the size of a minority taken into consideration for the purposes of protection

Lack of uniformity of treatment to different communities

Again the considerations bearing on the wealth, social position, educational efficiency and contributions to the public exchequer of the various communities in India received

no uniformity of treatment When, further, it was decided to consider the problem of what are now called the scheduled castes separately from the main body of the Hindus the latter were numerically weakened* from the point of view of protection and as such should have received a more liberal treatment than was accorded them at the Round Table Conferences and by the Committees set up under their auspices and by His Majesty s Government in the United Kingdom Nor in the formula finally evolved and in the provisions of Mr Macdonald s Communal Award was due weight given to the adult population and the qualifications required under the Act for franchise The adult Hindu population in Bengal as compared with the adult Mahomedan population is numerically in a better position than the total Hindu population *vis-a vis* the total Mahomedan population By qualifications defined for suffrage the Hindus are also stronger than the Mahomedans with the result that under the new scheme of government a smaller electorate will have a larger representation in the legislatures † The general criteria of minorities protection as indicated above have not been accepted uniformly and consistently in the settlement of the problem and it will be our endeavour to examine the issues involved in the next few chapters in a spirit of academic detachment and scientific enquiry

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* The total population in Bengal is 50,114 002 of which Hindus including the scheduled castes are 21,570 407 The scheduled castes number 9,124,624 while the Mahomedans are 27 497,624 souls (Report of the Indian Delimitation Committee 1936 Vol. I, p 39)

† The average general population per rural seat in Bengal is 300 00 as against 242,168 Mahomedans per seat The average number of general voters per rural seat is 37,606 as against 29,506 Mahomedan voters per seat No account seems to have been taken in the Award of the comparative strength of the adult population of each community and of its total population (*Ibid* Vol. II—Statement showing the average area population and voting strength per rural seat in the present and proposed legislatures)

CHAPTER XIII

FUNDAMENTAL RIGHTS

General Principles

The need for a declaration of Fundamental Rights

It is evident that there is a large measure of agreement among all sections of political thought in regard to the need for a charter of Fundamental Rights as part of the constitution of India A few preliminary remarks are necessary as indicating the trend of opinion in different countries in this respect The Statutory Commission while emphasising the greatness of the contribution which Britain is supposed to have made to Indian progress observes "It is not racial prejudice nor imperialistic ambition nor commercial interest which makes us say so plainly—it is a tremendous achievement to have brought to the Indian sub-continent and to have applied in practice the conceptions of impartial justice, of the rule of law, of respect for equal civic rights without reference to class or creed and of a disinterested and incorruptible Civil Service In his heart even the bitterest critic of the British administration of India knows that India has owed these things mainly to Britain " This is an expression of opinion which is endorsed by many people including Indians and Europeans That there is an element of truth in it is perhaps admitted on all hands

Then we have it on the authority of Dicey that the British constitution is "pervaded by the rule of law on the ground that the general principles of the constitution (as, for example, the right to personal liberty or the right of public meeting) are with us the results of judicial decisions, whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution "* The right to individual freedom is supposed

* Dicey The Law of the Constitution, p 191

to be inherent in the ordinary law of the land and that right is one which cannot be destroyed without revolution in the ordinary institutions and manners and traditions of the British people It does not form part generally of the written constitution in the United Kingdom unlike in the case of certain continental countries and all post-war democracies Dicey is of the opinion that a guarantee of fundamental rights in the constitution appears to an Englishman an unnatural and senseless form of speech The original advocates of personal freedom in England attached more importance to the question of providing legal remedies for the enforcement of particular rights and for averting specific wrongs than to the question of declarations of the rights of man and fortunately there grew up in England a succession of valiant and impartial judges who defied the executive when necessary and gave the people the protection they required in this regard Therefore the English constitution is based largely on judge made laws which represent an important aspect of the rule of law Dicey claims that although the English constitution lacks those declarations or definitions of rights so dear to the framers of the continental constitutions those rights are more respected in England than elsewhere * The Dominions generally have followed the example of England with the exception of Ireland which has incorporated in its constitution a charter safeguarding the fundamental rights and liberties of the people

Declarations of rights in post war constitutions.

All the post war constitutions contain declarations of fundamental rights These rights may be classified under the following heads

(1) Personal and religious liberty and rights derived from such liberty These rights are guaranteed to citizens and aliens alike and may properly be called the rights of man

(2) Civil and political rights such as the right to assemble to form associations the freedom of the Press the inviolability of residence and freedom of movement within the State These are

* There are some thinkers who hold that to-day personal liberty is more effectively safeguarded in France under the Administrative law than in England

reserved for citizens and guaranteed to aliens under certain conditions, and

(3) Still other primarily political rights such as the franchise for Parliamentary and Municipal elections These are reserved, as a general rule, for specially qualified citizens

All these rights, though in some respects interrelated, may be viewed from the standpoint of (1) liberty of person, (2) spiritual liberty, (3) economic liberty and (4) equality The recognition of the liberty of person was responsible for the abolition of slavery, *i e*, the ownership of one man by another The liberty of body implies liberty of locomotion No one is to be hindered according to it, in moving to whatsoever place he likes except in accordance with law (*e g*, if he has been legally imprisoned or committed to a lunatic asylum after legal proceedings or if he has been arrested in order to compel him to render a service which cannot be substituted for) If a person is confined on a charge or on suspicion of a crime, the judiciary must decide whether detention is lawful or not This is of the essence of the Habeas Corpus Acts which will be dealt with later Closely connected with the liberty of locomotion is the right of residence and of moving about from one part of the State to another and also of emigrating from it The liberty of movement, however, is regulated by the system of passports The inviolability of residence means that no private individual or official is entitled to enter a lodging or to search it except in accordance with law, or without permission of the owner thereof The secrecy of despatches sent by letters, telegrams and telephones also belongs to this group of rights

Spiritual Liberty

Spiritual liberty ordinarily means the liberty of conscience, of thought and of belief This right prohibits the use of force to extract from one the profession of a particular opinion or belief It implies further that the enjoyment of the rights of citizens as well as appointments to public offices must be independent of religious belief This principle is, however, inconsistent with the absolute and compulsory prescription of a religious oath to be taken before the State authorities The right of publicly expressing one's thoughts is somewhat different from the liberty of

thought itself So also the right of publicly professing a religion, especially in congregational worship is different from the liberty of conscience or of belief There are laws in almost all States prohibiting ceremonies which in their opinion, are illegal or immoral In certain countries again constitutional provisions guarantee the liberty of public worship only to certain denominations

Liberty of the Press etc.

The liberty of the Press was formally regulated by preventive measures such as censorship or the requirement of a license for publishing newspapers or a bond as a security for collecting possible fines All these methods are being followed in India under what is known as emergency legislation But in modern times censorship except under abnormal conditions does not exist In England it was abolished as early as 1695 Apart from preventive measures the liberty of the Press is subject to the law of libel and of sedition There has been much controversy on the question of forming associations It is held by some that the closer the purposes of an association approach the purposes of the State the greater becomes the competition between the association and the State this appears most clearly in those associations whose purpose it is to exert an influence upon the formation and development of the State organisation itself and which are called political associations * Accordingly the attitude of the State towards such associations depends upon the form of the State itself The liberty of forming associations is looked upon with suspicion not only in absolute monarchies but also in democracies Rousseau for instance held the liberty of association to be inconsistent with the idea and functions of the State The French declaration of rights of 1789 does not include the liberty of association In 1791 a French law (*Le Chapelier*) categorically forbade all professional associations and another law passed a year later dissolved all religious orders But it is now generally believed that the liberty of forming associations is an essential right of mankind and affords an effective means of protecting the individual although even to-day organisa

* Pitamic A Treatise on the State p 138

tions other than professional associations are hampered in France in enjoying the right of acquiring property. The French law is particularly severe against religious orders.

Economic liberty.

Economic liberty implies the capacity of freely disposing of one's personal wealth and the right of freely negotiating labour contracts and free choice of profession. Social customs and usages prevalent in India have considerably affected this right. There is however a different aspect of this kind of liberty. Under the influence of the labour movement Governments in modern times are called upon to intervene in a far-reaching manner in the economic life of the community for the purpose of increasing production, effecting equitable distribution and protecting the working classes from evils affecting their health, morals, etc. It involves some restraint on unlimited liberty, but intervention by private organisations and the State in economic matters designed in the interests of the economically weaker classes tends to realise the idea of social justice, in contradiction to the idea of unrestricted liberty. That perhaps is the reason why certain classes in the Hindu community commonly known as the depressed classes demand inclusion in the charter of fundamental rights not only a table of economic rights but wider powers of intervention for the State in socio-economic matters.

Religion, social or professional status, and wealth have all at one time or another been considered qualities justifying discrimination in law. Even at the present time differences are acknowledged particularly on the basis of nationality, citizenship, race or sex. When, therefore, we speak of equality before the law we mean only that those who at a certain period are legally held to be equal, must not be treated unequally. But legal equality is of no value if there is no equality in the application of the law by the executive authorities. Hence in modern democratic States an attempt has been made to do away with special or extraordinary courts such as those that existed in feudal times and to strengthen the judiciary and preserve their independence.

What is legal equality?

It is interesting to note the observation made by a distinguished scholar that "legal equality, in every respect, does not exist even amongst citizens, an

example of this is afforded by the rights of minorities as distinct from the fuller rights of the majority'* He admits that the Minorities Guarantee Treaties concluded after the War guarantee equality to citizens with regard to their civil and political rights without distinction as to race language or religion and that adequate facilities are given to the linguistic minorities for using their language before the courts and other State authorities and for having their children instructed in primary schools through the medium of their mother tongue Dr Pitamic maintains that these provisions do by no means establish the principle of equality for citizens belonging to a linguistic minority do not enjoy, even where they are protected the same rights as to the public use of their language as do citizens belonging to the linguistic majority This is a view which the Indian minorities claiming equal rights with the majority and in some cases preferential treatment as against the latter would do well to bear in mind

Grounds for statutory rights in India.

The question which naturally arises is why should India adopt the continental method and lay down a table of rights and find for it a place in the constitution? The answer to this question is twofold In the first place the inauguration of responsible government in the Indian Provinces and partially at the Federal Centre under the India Act of 1935 will mean to some extent the weakening of the authority of the Civil Service despite the safeguards and reservations and pave the way to the ultimate removal of control of Whitehall over Indian affairs Naturally the minorities have good reasons to insist that complete security should be guaranteed to them in regard to their legitimate rights The unfortunate fact that certain minorities such as the scheduled castes have been for ages treated very badly by the caste Hindus in social and other matters stares us in the face In the second place there is a school of political thought which seems to hold that notwithstanding declarations made by British statesmen and Royal Proclamations issued from time to time drastic measures have on frequent

* Pitamic A Treatise on the State, p 143.

occasions been adopted nullifying the so-called rule of law and violating the principles on which personal freedom is based According to that school, the power of the executive ought to be considerably curtailed so that they may not interfere with the exercise by the people of certain inherent and fundamental rights No loophole should be left for persons for the time being in power to use their discretionary powers for the purpose of imposing unnecessary restrictions upon the people in the name of law and order

But there is one distinguished Indian publicist, namely, Sir Sivaswamy Aiyer, who is of opinion that the "inclusion of a declaration of rights in a constitution must be held to be unnecessary, unscientific, misleading and either legally ineffective or harmful "* He proceeds to assign reasons for the view he has so emphatically expressed First, the rule of law is so firmly established in the system of English jurisprudence, by which we are governed, that the danger of executive interference with the rights of citizens except under distinct provisions of law is not within the range of practical politics † As we shall presently show, the rule of law which is the basis of English jurisprudence is not firmly rooted in this country and is liable to be violated by Indian legislative and executive authorities

The Colonial Laws Validity Act, 1865, and its scope

In the Colonies there had been a long-drawn controversy as to whether in cases of conflict between a Colonial statute law and the English Common law, the latter should prevail In some cases in South Australia Chief Justice Boothby decided that legislation by a Colonial Parliament

* Aiyer Indian Constitutional Problems, p 135 At the third session of the Round Table Conference on the 17th of December, 1932, Sir John Simon pointed out that "Fundamental rights would be valueless if they were not implemented by law Courts, and if they were implemented, it would lead to great confusion" Practically the same view was expressed by Sir Samuel Hoare on the 22nd December, 1932, who "wondered whether it would not be possible to include in the Act a limited number of the proposed rights which seemed to be susceptible to legislative treatment, and obtain a solemn declaration of the other and more general fundamental rights in some suitable manner such as the Proclamation that might be issued to establish the Federation

† Aiyer Indian Constitutional Problems, p 134

was void if repugnant to the law of England. The judgments were naturally resented by the Australian authorities and as a result the matter was referred to the law officers of the Crown in England at whose instance the Colonial Laws Validity Act of 1865* was enacted to define the doctrine of repugnancy in more precise terms. It was stated in the Act that a Colonial statute repugnant to the provisions of an Act of Parliament or any order or regulation made thereunder which was expressly or by implication applicable to the Colony concerned was void to the extent of such repugnancy.† The Act further gave the Colonies the right to pass legislation repugnant to the Common law of England as opposed to a Parliamentary statute.‡ It was in effect an Act calculated to extend rather than to restrict the spheres of legislative competence of the Colonies although it reasserted in clear and definite language the supremacy of the British Parliament over the Colonies.§

Professor Keith holds that the Colonial Laws Validity Act was passed to make clear the exact force of the vague rule imposed from the beginning of Colonial legislation on legislatures that their legislation was to be in accord with the principles of English law.|| The British Government decided that the doctrine of repugnancy of Colonial legislation was to be confined to repugnancy to enactments including orders rules and regulations made under such measures as were expressly or by necessary intendment applicable to the Colonies. Colonial legislatures were thus rendered free, in his judgment, to enact measures which contravened the principles of the Common law of England or even of statutory law when such statutory law had merely been introduced as part of the inheritance of English common law.¶ It is thus clear that the English Common law could be superseded by the Colonies after the passing of the Validity Act in 1865. The

* 28 & 29 Vict c 63. The Act does not apply to India.

† Sec. 2.

‡ Lord Halsbury's Judgment in Riel v The Queen (1885) A.C 675 Sec. 3.

§ Dicey The Law of the Constitution p 101.

|| Keith The Constitutional Law of the Dominions, pp 24-25.

¶ *Ibid* p. 25.

Statute of Westminster* has removed all restrictions on the law-making powers of the Dominions in so far as it has removed the doctrine of repugnancy† and conferred upon them the power to legislate extra-territorially ‡

In India a number of cases have established the fact that British Indian subjects do not enjoy all the rights flowing from the English Common law or that, at any rate, those rights may be abrogated by Indian-made laws In *Girindra Banerjee* v *Birendranath Pal* (31 C W N 593), for example, the issue was raised *inter alia* that under sub-section (4) of Sec 80A of the Government of India Act, a local Indian legislature could not make any law affecting any Act of Parliament and as such section 11 of the Bengal Criminal Law Amendment Act, 1925, empowering the Government to detain a person in custody without trial, was void and *ultra vires* as being opposed to the Magna Carta, the Petition of Right, the Bill of Rights, the Act of Settlement and similar other Acts of Parliament Rankin, C J , held that clause 4 of section 80A of the Government of India Act referred only to such Acts of Parliament as applied by their " own force " as to determination of the will of Parliament with reference to a particular subject matter, and not to rules and principles of English statutes and charters like the Magna Carta, the Bill of Rights, etc. He added that " it cannot be construed as meaning that because in 1726 when there was no other law the courts in Calcutta adopted the law that prevailed in England subject to many modifications, any part of the law so introduced which originated in statute as distinct from common law cannot be interfered with by the local legislature " It is no use drawing an analogy between the British Colonies and India in 1726 For, in the former the English settlers carried from the inception of the settlement their own law because the sovereignty of the English Crown went with them, while in the latter English Common law and Statute law as in 1726 was imported into Calcutta not

The English Common law in India

* 22 Geo 5, ch 4

† S 2 of the Statute Those Dominions which have not adopted the Statute remain subject to the restrictions of the Colonial Laws Validity Act, 1865

‡ S 3 of the Statute

by virtue of the sovereignty of the Crown nor by virtue of the fact that Englishmen at international law or otherwise carried with them their own statutes and laws but because by the sanction and permission of the then sovereign of the place the British community was allowed to apply its laws to itself and its Indian servants resident in the place and under its protection with adaptations to local circumstances In one case, therefore it was by the right of sovereignty and in the other case by sufferance that English laws were introduced Almost a similar view was taken as far back as 1870 by Cowell in his Tagore Law Lectures on the History and Constitution of the Courts and Legislative authorities in India Chief Justice Rankin seems to have been right in holding the view he did in this respect in Girindra Banerjee s case although the distinction sought to be drawn between Acts and Acts is a distinction without a difference

Certain Bengal Acts *ultra vires?*

But his interpretation of the scope of sub-section (4) of Sec 80A of the Government of India Act does not appear to us to be a precise statement of the law He admits that the particular sub-section is wider than the provision that the local legislature shall have no power to repeal a Parliamentary statute and that the word affect inserted in the clause may cover any interference with the will of Parliament as expressed in a statute It will be seen that in sub-section (2) of Sec 65 which deals with the Indian legislature as distinguished from a local legislature it is provided that it shall not have power unless expressly so authorised by Parliament, to make any law repealing or affecting any Act of Parliament passed after the year *one thousand and eight hundred and sixty and extending to British India** (including the Army Act, the Air Force Act and any Act amending the same) It is reasonable to argue that sub section (1) of Sec 84 of the Act which lays down that a law made by any authority in British India and repugnant to any provision of this or any other Act of Parliament shall, to the extent of that repugnancy but not otherwise be void should be read with sub-section (2) of Sec 65 so far as the Indian legislature is concerned It follows, therefore, that the Indian legislature is competent to

* The italics are ours.

repeal or affect any Act of Parliament passed prior to 1861 in exercise of the powers conferred upon it under sub-section (1) of Sec 65 but subject to the limitations contemplated in clauses (i) and (ii) of sub-section (2) But no such authority is conferred on any local legislature, the restriction in the terms of sub-section (4) of Sec 80A is complete and has no reference whatsoever to time or place

The scope of sec 80A (4) of the 1919 Act

It has been held by Rankin, C J, that the old English law introduced into Calcutta has been superseded by the Indian Penal Code and the Criminal Procedure Code Whether superseded or not so far as Calcutta is concerned, that law, should it form part of the existing English statutes, could not be affected by any local legislature under sub-section (4) of Sec 80A If, as we maintain the provisions of the Magna Carta, the Bill of Rights, etc, which are Acts of Parliament* still exist, whether they are specifically intended for British India or not, there is no authority for the Bengal legislature to pass laws repugnant or obnoxious to them The Criminal Law Amendment Act of 1925 and Acts of like character passed by the Bengal Legislative Council during 1930-34,† which seek to deprive His Majesty's subjects of the right to personal freedom and proper judicial trial, seem to be *ultra vires* and invalid in so far as they are repugnant to the provisions contained in those extant British statutes and in so far as they have not been corrected or regularised by competent Indian legislation Very little doubt remains as to the meaning of sub-section (4) of Sec 80A when comparison is drawn between the language of that sub-section and that of sub-sections (2) and (3) Moreover, it has not been convincingly proved that the I P C or the Cr P C has superseded the provisions as to personal freedom and right to a proper judicial trial incorporated in the British Acts, for they deal with persons arrested for certain alleged offences with a view to their being placed on trial before competent courts of law‡ and not with persons restrained or detained without trial

* Stephen Commentaries on the Laws of England, pp 68 69

† Bengal Act VI of 1930, Bengal Act XII of 1932 and Bengal Act VII of 1934

‡ Sec 54 of Cr P C.

In Ameer Khan's case in 1870 (6 B L R 392 on appeal 6 B L R 481) it was contended that the provisions of Regulation III of 1818 and two subsequent Acts empowering the Government to arrest and imprison a British subject without trial were *ultra vires* by reason of their contravening one of the limitations to the legislative powers of the Governor General in Council imposed by Sec 43 of the Charter Act of 1833* which lays down *inter alia* that the laws or Regulations passed by the Governor General in Council shall not affect any part of the unwritten laws and constitution of the United Kingdom and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or the sovereignty or dominion of the said Crown over any part of the said territories It was urged that is that if the Crown with drew protection of its laws from its subjects, it had no right to claim allegiance from them due in return for such protection That contention was in the main upheld by Mr Justice Norman who held however that the Common law did not apply to the Crown s Indian subjects residing in the *muffasil* Mr Justice Norman s view as regards the doctrine of allegiance was disapproved on appeal by Phear and Markby J J , but in *Annie Besant* v *Emperor* Rahim C J accepted it in 1916 (I L R 39 Mad 1085) The view of the Appellate Court seems to have found favour with the Privy Council It pointed out in *Bugga* v *King Emperor* (L R 47 Ind App 128) that only those Indian laws or regulations were *ultra vires* under Sec 43 of the Charter Act of 1833 reinserted in sub-section (2) of Sec 65 of the Government of India Act which sought to transfer or qualify allegiance or modify the obligations consequent upon that allegiance Laws or regulations were not void simply because some subject of the Crown thought that his allegiance was affected by them In *Damodhar Gordhan* v *Deoram Kanji* in 1876 (1 App Cas 332) the provision in the Charter Act was held to invalidate any Act of the Indian legislature intended to cede territory without prejudice however to the prerogative right of the Crown to cede it which in its turn

The doctrine of allegiance to the Crown

* 3 & 4 Will IV c. 85

Common law rights in the territories acquired Section 110 of the new India Act while keeping in tact the power of Parliament to legislate for British India or any part thereof saves from Federal or Provincial legislation certain Acts of Parliament* and protects the sovereignty dominion or suzerainty of the Crown in any part of India† and the law of succession to the Crown and is therefore, far more clear than the provisions of the Government of India Act reproduced as they were from the Charter Act of 1833

It should be noted that no provision like that contained in sub section (4) of Sec 80A of the old Act is made in the 1935 Act with reference to the Provincial legislatures Those legislatures are subject to the limitations embodied in sub-section (2) of Sec 108 clause (b) of Sec 110 Sections 297 299 and the Seventh Schedule to the Act What is important to remember is that Sir Sivaswamy Aiyer s thesis on the English rule of law as being applicable to India has not been upheld consistently in the courts of law

Again the provisions of law to which Sir Sivaswamy refers do not constitute effective or adequate remedies against executive encroachments on popular rights For the provisions of law themselves may violate the fundamental principles of law and justice and invest the executive with extraordinary powers To say therefore that there is no danger of executive interference with personal rights except according to law is to beg the question Secondly we are told that the rights included in these declarations are not placed above the reach of the legislature ‡ The suggestion is that the legislature may at any time infringe the rights embodied in the constitution To that the answer is simple There may be certain safeguards in the constitution which the legislature sitting in its usual and ordinary way will not be competent to alter amend or modify It has been proposed for instance that provisions dealing with the personal laws reli

* The Acts or laws completely protected are the law of British nationality the Army Act the Air Force Act the Naval Discipline Act and the law of Prize or Prize Courts The Act of 1935 and the rules or orders made thereunder and the King s prerogative to grant special leave to appeal are saved subject to the other provisions of the Act itself

† Professor Keith is not quite accurate when he refers to British India in this connection. The saving extends to the whole of India including the Indian States and not merely to British India (Keith: A Constitutional History of India p. 179)

‡ Aiyer Indian Constitutional Problems p. 184

gious rites and customs of any community should be placed outside the purview of the legislature sitting in its ordinary capacity and discharging its functions according to the ordinary procedure. With regard to those safeguards which do not come under this category, it may be pointed out that members of the legislature would think seriously before taking any step to nullify them by a newly promulgated statute, and this, in itself, would constitute a great and effective check on hasty and ill-advised legislation Then further even if legislative control over the constitution be complete and unqualified—in India that control is subject to certain reservations*—it is much better than constant and irritating executive interference

Thirdly, Sir Sivaswamy says that "the language in which the so-called rights are declared clearly shows that they are not legally enforceable rights at all "† Whether the rights are legally enforceable or not, the judiciary is likely to show greater regard than now for the fundamental rights of the people, should they form part of the constitution, in dealing with cases arising out of executive or police excesses The judiciary will then interpret the laws in the spirit of the declaration thereby removing to a considerable extent any possible chance of abuse of their authority by the executive or the police It is not true to say that if these rights are not enforceable in a court of law, they are merely illusory safeguards

Functions of the legislature may be interfered with

Further, Sir Sivaswamy argues that if these rights are treated as " having the force of law and as not being liable to change by the ordinary legislature they are sure to interfere with the working of the legislature and to hamper the passing of legislative measures which may be found to be called for in the interests of the safety of the State "‡ This eminent publicist and lawyer will, however, admit that in all written constitutions the powers of the legislature are not so wide and extensive as in the unwritten and flexible constitutions In the former case, there is more scientific separation of powers and the legislature is not an omnipotent body.

* S 308 of the 1935 Act

† Aiyer Indian Constitutional Problems, p 134

‡ Aiyer *Ibid*, p 135

But that does not mean that the legislature will not at all be able to deal with emergencies In the last resort those who are responsible for the constituent functions of the State are competent in law to use and from the point of view of practical politics, do use their reserve or inherent powers in circumstances justifying and calling for drastic measures subject to the restrictions imposed on them by the constitution

What is aimed at by a declaration of rights is an effective check more upon executive interference than upon legislative competence With all deference, therefore, to Sir Sivaswamy Aiyer and Sir John Simon we think that the Rt Hon ble Srinivasa Sastri was right in insisting on the inclusion of a table of essential rights in the body of the constitution, if not for the purpose of ensuring the enjoyment of individual liberty at any rate, for the purposes of political education Mr Sastri says that a declaration of rights gives the juridical background of a people s public life, in other words, the fundamental legal and juridical notions upon which political institutions are based * A declaration of fundamental rights will serve as an instrument of education to the people and a warning to the executive who in vested with extraordinary powers may feel inclined to abuse their powers and defy public opinion

The nature of protection in statutory declarations.

It may be pointed here that there have been a long series of important adjudications in the United States bearing on the inherent limitations on Governmental power The United States constitution contains as we have already seen, a statement or declaration of fundamental rights, but evidently no declaration can be exhaustive and anticipate controversies arising out of circumstances which nobody can foresee It has been found extremely difficult to secure from the Supreme Court a uniformity of decisions on the issue involved in the implied powers of the Government *vis-a vis* the inherent rights of the people In *Bardwell* v *Anderson and Collins*† the Court held that there are certain fundamental rights which our system of jurisprudence has always recognised which not even the legislature can disregard in pro-

* Sastri Kamala Lectures (Calcutta University Publication) p. 23
† 44 Minn 97 46 N W 315

ceedings by which a person is deprived of life, liberty or property" On the other hand, in *Williams* v *Evans*,* it has been laid down that "the legislature has all legislative power not withheld or forbidden by the State or Federal constitution" There are cases, some seeking to vindicate the authority of the Government and others purporting to protect the people against encroachments on rights based on natural justice and reason It is urgent that in order to prevent possible conflicts in India as well as to limit the authority of the State, in so far as that limitation is necessary to uphold the ultimate sovereignty of the people and to assert their rights, a declaration of fundamental rights should be incorporated in the constitution Such a declaration would give the Courts the necessary guidance as to how and where the Government and their officers stand in relation to citizens It will not solve the problem but will certainly simplify it Besides and above all, special protection of the minorities flows from and is dependent on declarations of fundamental rights †

The main object of such declarations is to protect the individual citizen against the organs of the State, particularly the executive, in order that they may not exceed the powers given them under the constitution and imperil his liberty But occasions may arise when the exercise of unrestricted liberty on the part of the individual becomes dangerous to the State It is necessary then and only then to suspend the fundamental rights of the people But in a real democracy such a drastic step must be taken with great care and caution and its operation must not be unduly oppressive and prolonged

Almost all modern constitutions provide for suspensions of these rights in times of danger It is laid down, for instance, in section 9 of Article I of the United States Constitution that the "privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it" The nature and period of suspension depend in a country generally upon the form of its Government It means that the more democratic a country, the less drastic is the nature of the suspension law But although this proposition is

* 139 Minn, 32, 165 N W 495, L R A 1918 F, 542

† *Cf* Chapter IV, *supra*

generally correct, it is well known that some of the most democratic countries on paper at least have invaded most violently the rights of citizens An attempt has been made to develop this thesis in an earlier chapter with particular reference to Germany, Russia and the Irish Free State

A state of siege in France.

Modern constitutions, however do not permit of suspensions of fundamental rights without previous or at least subsequent sanction of the legislature According to the French law of 1878, the state of siege (*Etat de siege*) may be declared in times of war or armed rebellion by a law but it must be determined at the same time for which district and for how long this extraordinary measure is to be in operation The effect of this is the transfer of jurisdiction in the maintenance of law order and security from the civil power to the military authorities whenever and in so far as the latter deem such transfer essential The military authorities are entitled to order home searches seize arms and prohibit publications and meetings calculated to foster and foment disorder Any action against the security of the State, the constitution and peace and order, is to be tried before the military courts If the necessity for a state of siege arises while the legislature is not in session the President of the Republic is empowered to declare it by a special decree but the legislature must either approve or cancel his decree at the earliest opportunity Similar provisions have been made in the German constitution to which reference has already been made

Suspensions of *habeas corpus* in England

In Great Britain a somewhat different procedure is followed In times of danger certain provisions of the Habeas Corpus Acts are held in abeyance Its legal effect is that persons arrested or imprisoned on certain criminal charges forfeit their claim to a speedy trial or release When however the Suspension Act ceases to be in force anyone who has kept in custody a person wrongfully is liable both civilly and criminally It may not always be fair to make officers of the State liable for acts committed in times of great excitement and for the purposes of the maintenance of law and order and that is why in Great Britain on the expiry of the Suspension Act, an Act of

Indemnity is passed with a view to rendering the servants of the State immune from prosecution for having committed the breaches of law during the time of the suspension But it must be remembered that Indemnity may be given only by means of law which means that it is Parliament which will decide whether the state of things justified the passing of an Indemnity Act to circumvent the liabilities for breaches of the law during the suspension period Generally, however, Parliament gives the executive the power which they seek in this regard

I Freedom of Discussion

A new English measure to deal with sedition

Freedom of discussion and liberty of the Press are two of the most essential and cherished rights of man in the civilised world In *Rex* v *Sullivan* Lord Fitzerald sitting in court with Justice Cave addressing the Grand Jury observed· "By liberty of the Press I mean complete freedom to write and publish without censorship and without restriction, save such as was absolutely necessary for the preservation of society Our civil liberty is largely due to a free Press which is the principal safeguard of a free State, and the very foundation of a wholesome public opinion " * His Majesty's subjects in England enjoy a large measure of freedom of discussion and liberty of the Press The position there has to some extent been altered under Mr Macdonald's National Government A measure dealing with incitement to disaffection in the forces sponsored by that Government makes the possession of documents likely to cause sedition an offence † It authorises search and seizure on a magistrate's warrant It confers on the Director of Public Prosecutions power to decide whether a case should be dealt with summarily There have, however, been two important amendments to the original Bill The first amendment appears to transfer the onus of proof that a man is in possession of seditious literature for the purpose of committing an offence under the Act to the prosecution It was originally

* XI Cox , 44

† *Cf* Ss 35, and 36 of The Bengal Suppression of Terrorist Outrages Act, 1932.

intended to impose upon the defendant the obligation of proving his innocence* which was a complete reversal of the English legal doctrine that a man is innocent until proved guilty The next amendment is calculated to secure a defendant the right to choose trial by jury But freedom of discussion does not mean that the person who claims that right is competent under pretence of freedom to attack the rights of the community or to bring into public contempt the constitution or the judiciary or to promote an insurrection or disturb public peace † In other words every Englishman is free to write and say anything but he is held responsible in law for what he writes and says This is the only restriction imposed by law upon the liberty of the Press and freedom of speech

The English law of libel.

The English law of libel includes not only seditious libel but also libel against private persons So far as the second kind of libel is concerned it may be pointed out that the person who makes a defamatory statement and authorises its publication in writing, the actual writer of the statement and the printer and the publisher of the said printed matter are all liable in law and may each be severally sued or proceeded against Honest belief and good intention on the part of the libeller constitute no legal defence of his conduct It does not protect him even if he can show that he had good reasons to think that the false statement he had made was true The mere truth of a defamatory statement does not secure immunity for him from legal liability But by Lord Campbell s Libel Act of 1843 the defendant on an indictment is allowed to plead the truth of the defamatory statement and to plead also that its publication was for the public good The criminal liability of a publisher has been altered by the admission of proof that the publication was without his knowledge and did not arise from negligence on his part The right thus secured is very valuable inasmuch as the libeller cannot be penalised by the court if he can prove that the defamatory statement he published was in public interest

* Cf B S T O Act s. 30

† Cf Professor Keith s foot-note at p 806 of Anson s The Law and Custom of the Constitution (Part I) the Police Act of 1919 and the Emergency Powers Act of 1920

The law relating to sedition important

We are not, however, concerned as much with that aspect of the law as we are in this country with the law of sedition in connection with the freedom of discussion and liberty of the Press The law of sedition extends to seditious words spoken and also to seditious libel, *i e*, the seditious words written and published. In *Russell on Crimes* the English law of sedition is defined thus

> "Sedition consists in acts, words or writings, intended or calculated, under the circumstances of the time, to disturb the tranquillity of the State by creating ill-will, discontent, disaffection, hatred or contempt, towards the person of the King or towards the constitution or Parliament or the Government or the established institutions of the country, or by exciting ill-will between different classes of the King's subjects or encouraging any class of them to endeavour to disobey, defy, or subvert the laws or resist their execution, or to create tumults or riots, or to do any act of violence or outrage, or endangering the public peace "*

The British Press enjoys ample measure of freedom

Sedition, as Lord Fitzerald observes,† " is a crime against society and nearly alike to that of treason, and it frequently precedes treason by a short interval From Russell's definition it is clear that sedition is a very comprehensive term in England embracing as it does within its scope not only attacks on the State but also offences relating to class hatred If the wording of the law‡ is interpreted and acted upon literally, then the freedom of discussion and the liberty of the Press are practically reduced to a nullity in England But as in many other matters English law and English practice are not identical in regard to sedition also, for even under this comprehensive law the English Press and platform enjoy an ample measure of freedom Whatever might be the law, "it is now extremely seldom that any attack on the Government or on either House of Parliament is treated as seditious, and the constitution

* "In England the offence of seditious libel is not a statutory offence defined by Act of Parliament but a common law misdemeanour elaborated by the decisions of judges" (Justice Strachey in Tilak's case)

† Rex *v* Sullivan (XI Cox 44)

‡ A seditious intention is also defined by statute (60 Geo III and I Geo IV C 8 S I)

is frequently abused with impunity * As a matter of fact the greatest latitude is permitted in England in the discussion of political affairs Nor is this all Prosecutions in seditious cases are tried by ordinary courts with a jury who are entitled to give a verdict on the issues raised and therefore it is the jury who determine the question of criminality or innocence of the words used by the defendant † Further after having quoted Lord Kenyon s maxim that a man publishes whatever a jury of his countrymen think is not blamable Lord Fitzerald asked the jury in *Rex* v *Sullivan* to remember that ' in ordinary cases the facts are for the jury and the law for the judge but in cases of libel and with a view to the true freedom of the Press the law casts on the jury the determination of both law and fact It is therefore clear that the verdict of twelve impartial Englishmen decides whether a particular expression of opinion constitutes sedition ‡ It gives the people an effective safeguard against executive excesses or judicial indiscretion

The Indian law adopted from the English law

The Indian law of sedition is defined in section 124A of the Indian Penal Code That section is taken almost *verbatim* from the English law on the subject save that clause of the law which deals with the offence of promoting class hatred—a subject which in India is treated of in section 153A of the Indian Penal Code The Indian law of sedition reads as follows

> Whoever by words either spoken or written or by signs or by visible representation or otherwise brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection towards Her Majesty § or the Government established by law in British India shall be punished with transportation for life or any shorter period to which fine may be added or with imprisonment which may extend to three years to which fine may be added or with fine

* Lord Hewart The New Despotism pp 80-81.

† *Ibid* p 80

‡ Those expressions only are taken exception to which constitute incitement to violence and are used for the purpose of causing riot or rebellion (Lord Hewart The New Despotism, p. 81)

§ In Schedule I to the Government of India (Adaptation of Indian Laws) Order 1937 or the Crown Representative has been inserted. By the same Order the term shall mean His Majesty s Representative for the exercise of the functions of the Crown in its relations with Indian States

There are three explanations attached to this section

Explanation I —The expression "disaffection" includes disloyalty and all feelings of enmity

Explanation II —Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting, or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section

Explanation III —Comments expressing disapprobation of the administrative or other actions of the Government, without exciting or attempting to excite, hatred, contempt, or disaffection, do not constitute an offence under this section

Some leading cases on sedition

The present law of sedition is the result of an amendment carried out in 1898 of the original law of 1870 * The law has not been altered in any important respect but has been stated in clearer language in the light of judicial decisions delivered from time to time, particularly in *Queen Empress* v *Jogendrachandra Bose* (19 Cal 35), *Queen Empress* v *Bal Gangadhar Tilak* (22 Bom 112), *Queen Empress* v *Ram Chandra Narayan and another* (22 Bom 152) and *Queen Empress* v *Ambaprosad* (20 All 55)

Amendment of the law based on judicial decisions

The discussions that took place when the amending section was on the legislative anvil bring out in bold relief the reasons which led the Government to modify the law In some of the cases referred to above different interpretations had been placed upon the words used in the original section, and although the judges had admitted the widest possible scope of the section in their decisions, it was felt that no loophole should be left for any doubt or ambiguity in the matter The executive wanted the law to be more effective for the purpose of meeting the requirements of the situation and hence, on the basis of judicial decisions, they proceeded to amend the law and thus strengthen the hands of the Government.

Analogy between England and India holds no good

Mr Chalmers, Member in charge of the Bill, while explaining the purpose of the amendment said in reply to the objections raised against the amendment

* See Act IV of 1898.

> In Article 90 of that Digest (Stephen's) he states the English law in the clear and precise terms which I read to the Council on the 21st December There is nothing in that Article and there is nothing in the almost identical Article framed by the Criminal Court Commission to suggest that an appeal to violence is a necessary factor in the offence I take it that the offence is complete both in India and in England if it be proved that the offender had attempted to excite disaffection towards the Government It is not necessary that he should himself appeal to force But after all these arguments are more or less academic No one in his senses would contend that because a given law is good and suitable in England it is therefore good and suitable in India
>
> Language may be tolerated in England which it is unsafe to tolerate in India because in India it is apt to be transformed into action instead of passing off as a harmless gas In legislating for India we must have regard to Indian conditions and we must rely mainly on the advice of those who speak under the weight of responsibility and have the peace and good government of India under their charge *

Again Sir Alexander Mackenzie the then Lieutenant-Governor of Bengal observed

> Much of the outcry against the present Bill rests upon its supposed divergence from the law of England on seditious libel and on the assertion that the law as settled in 1870 was sufficient and ought to be final Now I venture to assert these two propositions—first that the law of England built up by judicial rulings to meet the circumstances of a homogeneous people directly interested in and sharing in its own government is not necessarily a norm to which the law of India ought strictly to conform and second that the conditions of the country have themselves so altered since 1870 that what was adequate then is not necessarily adequate now
>
> It is clear that a Sedition law which is adequate for a people ruled by a government of its own nationality and faith may be inadequate or in some respects unsuited for a country under foreign rule and inhabited by many races with diverse customs and conflicting creeds It is impossible in India to accept the test of direct incitement to violence or intention to commit rebellion and limit the interference of the Government to such cases †

* Proceedings of the Governor-General's Council 1898 Vol XXXVII Appeal to violence is at present considered to be an element of the offence in England.

† *Ibid.*

The law as amended has not of course widened the scope of the law of sedition in this country The judicial interpretation as it stood between 1870 and 1898 had already defined the range and scope of the law The amendment has only restated it and obtained legislative sanction for the judicial decisions As we have said, there is nothing particularly objectionable in the Indian law as such as contrasted with its English counterpart

The application of sedition law in India

But the question is, how is the law applied here? Mr Sastri says, "We know too well that, while that law in England is brought into operation with the greatest caution and the executive bear a lot of provocation before they resort to it, in India there is almost nothing by way of free criticism which the executive do not resent, and, if only they care, do not also bring up before the courts "* The observation made by Mr Sastri deserves to be seriously considered and is entitled to a respectful hearing The number of sedition cases that are brought up before the courts annually against the Indian Press and nationalist speakers is rather large It raises the presumption that either the country is always in a mood to delight in seditious attacks or to listen to them or that the Government are anxious on every possible occasion to penalise the freedom of discussion and liberty of the Press for the purpose of suppressing expressions of public disapproval or disapprobation of the measures adopted by them

The points on which the application of the law in India differs from that in England

The practice that has grown up as a result of the judicial interpretation of the law of sedition also helps the executive to a considerable extent in unduly regulating and restricting the freedom of the Press and of discussion The courts have held that appeal to violence is not a necessary constituent of the law of sedition as defined and laid down in section 124A of the Indian Penal Code Then further the cases under that section are not usually tried in India with the help of a jury It is the courts which decide both the questions of fact and of law leaving the accused persons no chance to appeal to the common sense of "twelve impartial men of the realm " On these two points, therefore, the

* Sastri Kamala Lectures (Calcutta University Publication), p 28

practice here marks a departure from what is prevalent in England, and it is a departure which cannot be justified, especially when India is on her way to a democratic form of government

The liberty of the Press is affected not only by the law of sedition but also by section 99 A G of the Criminal Procedure Code the Post Offices Act, the Sea Customs Act, the Princes Protection Act, the existing Press emergency laws and sections 35 and 36 of the Bengal Suppression of Terrorist Outrages Act of 1932 as amended up to 1934

II The Right of Public Meetings and Associations

Law relating to meetings and associations

The right of public meeting and of association as we have seen in an earlier chapter forms an essential part of the fundamental rights of the people in all modern democracies In England the police or the executive have no special power to control open air assemblies The English nation have enjoyed this right for a fairly long time thanks to the alertness of the people and the protection extended to them by the courts *

That right had been established long ago and the celebrated case of *Beatty* v *Gillbanks*† states it with marked accuracy and precision The facts of the case are these The magistrate concerned apprehending a breach of the peace at Weston Super Mare had served a notice on the Salvation Army in order to prevent the Army from holding their meeting at that place They ignored the notice and assembled at that place with the knowledge that their meeting would provoke the Skeleton Army

* *Cf* the provisions made in the recently promulgated Public Order Act in England (1936) It prohibits the wearing of a uniform signifying association with a political organisation except on certain ceremonial occasions and organisations to be trained and equipped for physical force for promoting political objects It empowers the authorities to prohibit public processions or dictate the route to be followed by them It forbids the carrying of offensive weapons at public meetings and processions and the use of abusive and provocative language and behaviour in public places. The measure seems to be drastic and a sort of compliment to the Fascist method of political purging But much will depend on its application.

† 9 Q B D 308.

to cause disturbance The police appeared on the spot and asked the Salvation Army to obey the notice of the magistrate and disperse One of the members of the Salvation Army refused to obey the order and was arrested Subsequently the arrested person and a few others were convicted by the magistrate on a charge of organising and participating in an unlawful assembly The conviction by the magistrate was on appeal set aside by the Queen's Bench Division In delivering the judgment Field, J, observed

> "What has happened there is that an unlawful organisation (the Skeleton Army) has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justice amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act There is no authority for such proposition "

The principle stated in that case was accepted and upheld in *Rex v Justice of Londonderry* * The presiding judge in the course of his judgment remarked

> "I agree with both the law as laid down by the judges, and their application of it to the facts as they understood them The principle underlying the decision seems to me to be that an act innocent in itself, done with innocent intent and reasonably incidental to the performance of a duty, to the carrying on of business, to the enjoyment of legitimate recreation, or generally to the exercise of a legal right, does not become criminal because it may provoke persons to break the peace, or otherwise, to conduct themselves in an illegal way If danger arises from the exercise of lawful rights resulting in a breach of the peace, the remedy is the presence of a sufficient force to prevent that result, not the legal condemnation of those who exercised those rights "

A lawful assembly cannot be declared unlawful except under special circumstances

It is now a well-established law in England that a lawful assembly meeting for purposes which are not prohibited by law cannot be declared unlawful on the ground that the exercise of the lawful rights by the assembly may pro-

* 28 L R Ir 440

voke wrong doers to cause disturbances and breaches of the peace If any such case arises *i e*, if a conflict arises between a group of persons intent on meeting together for lawful purposes and another group of persons who with the avowed object of preventing the former from holding their meeting, cause disturbances, it is the business of the police to stop the wrong doers and trespassers and thereby prevent the conflict It is not proper on the part of the police to prevent the holding of a lawful assembly or to arrest those who exercise their lawful rights Dicey thinks that there is an obvious and important limitation upon this right of public meeting—a limitation which has been emphasised in some judicial pronouncements * The principle has been asserted for example in *O Kelly* v *Harvey* (1883) that should a magistrate have ' reasonable and provable grounds for believing that there would be a breach of the peace if certain people assemble at a particular place he is not to defer action until a breach of the peace had actually been committed His paramount duty in the circumstances is to preserve the peace unbroken and that by whatever means were available for the purpose It does not matter even if the magistrate fails subsequently to prove, when challenged, that the meeting was in fact unlawful Where a public meeting though the object of the meeting and the conduct of the members thereof are strictly lawful provokes a breach of the peace observes Dicey and it is impossible to preserve or restore the peace by any other means than by dispersing the meeting then magistrates, constables and other persons in authority may call upon the meeting to disperse and if the meeting does not disperse it becomes an unlawful assembly †

Again in another important case (*Wise* v *Dunning* 1902)‡ a Protestant lecturer conducted a vigorous campaign of open air meetings in the Roman Catholic quarters of Liverpool On previous occasions his demonstrations had caused serious disturbances largely on account of the lecturer s offensive utterances concerning Roman Catholics He was summoned on information that breaches of the peace had taken place in conse-

* O'Kelley v Harvey (14 L.R Ir 109)
† Dicey The Law of the Constitution pp 273-74
‡ I K B 167 K & L 857

quence of the meetings and that there was reason to believe that he intended to hold similar meetings whereby serious breaches of the peace would follow The summons asked that Wise must be ordered to find securities to keep the peace It was held that the magistrate had jurisdiction to bind him over in recognisances to be of good behaviour This case differs, as Wade and Phillips point out,* from *Beatty* v *Gillbanks* in that whereas Wise had previously been found guilty of the breaches of the law, the Salvation Army had committed no illegal acts or caused no breaches of the peace.

To prevent transaction of lawful business is an offence

Dicey, however, admits that the only justification for preventing a lawful assembly from exercising their legal rights is what he calls "the necessity of the case" It means that only in extreme emergencies when peace cannot be maintained by any other means a lawful assembly may be called upon to disperse. Under the provisions of the Public Meetings Act of 1908 any person creating disorder or attempting to create disorder for the purpose of preventing the transaction of business at a public meeting is guilty of (*i*) an offence punishable summarily provided the meeting is a lawful one and (*ii*) an illegal practice within the meaning of the law† provided the meeting is a political assembly held between the issue of and return to a writ for the election of a member of Parliament

The Indian law gives extensive powers to magistrates

The Indian law on the subject is governed by the Seditious Meetings Act, 1911, and the Criminal Procedure Code By the former Act the Governor-General in Council has power to extend its provisions to a province When a particular province is brought within its purview the local Government‡ notifies certain areas and proclaims that in those notified areas no meeting can be held without three days' notice to the district officer The district officer can, however, dispense with the notice, but then that is a matter for him alone to decide Even if the requisite notice is given the district officer can prohibit the meeting if he is of opinion that such a meeting is likely to disturb

* Wade and Phillips' Constitutional Law, p 308
† The Corrupt and Illegal Practices Prevention Act, 1863
‡ The impression "Local Government" shall now be read as "Provincial Government"

the public peace The magistrate s action in preventing meetings under the Act cannot be called in question before a court of law thus proving that he has rather extraordinary powers in this respect Apart from the fact that such an act is repugnant to the spirit of a free and democratic constitution there is the danger of the provisions of the Act being used for the suppression of public opinion and banning of public meetings

Judicial control of preventive measures in India.

But it is necessary to bear in mind that sometimes the practice observed in England, that is, that a lawful assembly meeting for purposes which are not prohibited by law cannot be declared unlawful on the ground that the exercise of the lawful right by the assembly may provoke wrong-doers to cause disturbances and breaches of the peace, is accepted by the courts in India as the underlying principle of the Indian law also An important case arose a few years ago out of a petition made before the Hon ble Mr S K Sinha Chief Presidency Magistrate of Calcutta, by an Assistant Commissioner of the Calcutta Police The petitioner prayed for an order under section 144 of the Cr P C to be served on the Chief Executive Officer of the Calcutta Corporation directing him not to hoist or allow anybody to hoist Congress flags for a period of one week from June 16 1933 on Corporation buildings parks and other Municipal institutions as was likely to be done in connection with the C R Das Death Anniversary celebrations on the ground that the same was likely to cause annoyance to certain sections of the public and thus lead to a breach of the public peace The magistrate held that the hoisting of Congress flags is not an offence by itself The duty of the police is not to interfere with those hoisting Congress flags but to warn those who are likely to create a disturbance of the public peace when flags are hoisted and to bind them down if necessary, under Section 107 Cr P C The learned magistrate rejected the prayer of the Assistant Police Commissioner

In another important case which came up before the Calcutta High Court the issue raised was slightly different but the judgment of the court is interesting This was a case brought against certain shop-keepers at Chandpur in Bengal, who were

alleged to have hoisted the National Flag on January 26, 1933, generally known as the Independence Day, and refused to pull it down when asked by the police to do so The magistrate convicted the accused under Section 17(1) of the Criminal Law Amendment Act and sentenced them to one month's rigorous imprisonment and a fine of rupees thirty each as in his opinion they hoisted the flag in compliance with the surreptitious directions of an association lawfully declared by the Government to be unlawful and thereby assisted the secret and surreptitious operations of such an association On appeal the Sessions Judge of Tipperah upheld the conviction but reduced the sentence to a fine of rupees thirty each, setting aside the sentence of imprisonment The Sessions Judge observed in the course of his judgment that while the hoisting of the flag was in itself not an offence, doing so on a day and at a time prescribed by unlawful associations together with refusal to take it down when requested to do so by a responsible police officer clearly amounted to a conduct assisting the operations of the associations in question Against that order the petitioners moved the High Court and obtained a rule In setting aside the conviction and directing the fine paid to be refunded, Ghose, C J (Acting), said that the Court were not of the opinion that the hoisting of what was called the National Flag or the refusal to take it down at the request of the police in the circumstances of the case meant assisting the operations of an unlawful association "The simplest way," added the Acting Chief Justice, "would have been to make the hoisting of the flag illegal" The rule was accordingly made absolute so that the petitioners obtained the relief which they had asked for

Application of force to disperse assemblies

Now the various sections in Chapter IX of the Cr P C, which deal with "unlawful assemblies," define the powers of the executive, the police and the military in regard to meetings of a certain description Any magistrate or an officer in charge of a police station may call upon an unlawful assembly to disperse* There is nothing wrong or improper in that provision But the magistrate or the police

* Sec 127

officer, as the case may be, may ask any assembly of five or more persons to disperse if he has reasons to believe that such an assembly is likely to cause disturbances of the public peace An assembly, for instance, may meet for a lawful propose, say, a religious procession, but it may be lawfully ordered to disperse if, in the judgment of the relevant authority, it is likely to cause such opposition as to involve a breach of the peace * If any such assembly does not disperse in accordance with the order of the magistrate or the police officer, any magistrate or officer in charge of a police station can proceed to disperse it by the application of force † The only safeguard against the employment of excessive military force is contained in the provision that in acting under the instructions from the magistrate the military officer, when called upon to disperse an assembly by military force, shall use as little force, and do as little injury to person and property as may be consistent with dispersing the assembly and arresting and detaining such persons ‡

Practical immunity from legal liability enjoyed by officers.

Perhaps the most unsatisfactory provisions of the chapter are inserted in section 132 which lays down that no prosecution against any person for any act purporting to be done under this chapter shall lie in any criminal court except with the sanction of the local Government § The immunity of the officers soldiers and policemen from criminal jurisdiction is sought to be strengthened by an additional clause providing that good faith on the part of such persons shall exonerate them from all criminal liability Proceedings cannot be instituted in any criminal court against any

* 7 Bom 42.

† Cf Bom Pol Man p 70 C P Pol Man p 16

‡ Sec. 130 (2) Cr P C

§ The power to disperse an unlawful assembly by force as contemplated in the Code is not given to any policeman below the rank of an officer in charge of a police station No sanction is therefore necessary for the prosecution of a policeman below that rank for firing on an unlawful assembly (50 Cal 328) Immunity from civil or criminal proceedings in respect of acts done under Chapter I of the B. S T O Act 1932 is guaranteed under sec. 19 (cf S 4 of Indian Act No XXIV of 1932) The Local Government shall now be read as the Provincial Government an expression which has been defined in Schedule I to the Indian Laws Adaptation Order

officer or soldier of His Majesty's Army save with the sanction of the Governor-General in Council

All these sections show the marked difference between the Indian law and the English law on the subject First, it is clear that there is no provision therein making it imperative in law on the part of the magistrate, or of the commissioned officer in His Majesty's Army in the absence of the magistrate, to give a warning to the mob or the crowd before resorting to firing * In England the procedure is that when the guardians of law and order are faced with an unlawful assembly determined to disobey their orders, or with an assembly which threatens to turn into a riotous and disorderly mob, the Riot Act is read out to them by way of warning and usually one hour is allowed to lapse before strong measures are adopted † It is only in emergencies that this legal requirement may be ignored Secondly, in England no one shooting under orders on such occasions is exempt from legal liability, both civil and criminal "Nothing in this Act contained," one finds in the Mutiny Act, " shall exempt or be construed to exempt any officer or soldier whatsoever from the ordinary process of law "‡ " When a soldier is put on trial on a charge of crime, obedience to superior orders is not of itself a defence," observes a great constitutional authority § This view is supported by the observations of Russell|| made on the authority of *Rex* v *Thomas*

How the Indian law is defective

The soldier in England thus is not entitled to attack the supremacy of the law If relief in a criminal court against excessive action on the part of the soldier is not secured in a particular case, or if the relief obtained is not, in the opinion of the aggrieved party sufficient, then there is the civil court where the party concerned can go for the purpose of claiming damages against the offending soldier Mr Sastri, however, is prepared

* Directions as regards warning, application of force, etc , are contained in certain Police manuals

† Report of the Commissioners appointed to enquire into and report on the conduct of the troops in the Addton Colliery in 1893

‡ I William & Mary, C 5 s 6

§ Dicey The Law of the Constitution, p 298

|| Russell Crimes and Misdemeanours (4th edition), p 823

to exempt the soldier in India placed in such a position from civil liability He says To require him to be liable to military duty and at the same time make him incur civil penalties it seems to me is to ask too much * We respectfully differ from Mr Sastri and are decisively of the opinion that no such undue privilege should be accorded to the soldier Mr Sastri seems to look at the question from the point of view of the soldier and not from the standpoint of the citizen and his fundamental rights

The previous sanction procedure objectionable

It is very difficult if not almost impossible to obtain any relief against unnecessary and excessive violence which may be used by the soldier if in criminal prosecutions the previous sanction of the Governor General in Council is deemed legally essential as at present We have it again on the authority of Mr Sastri† that the Governor General has never once given this previous sanction ‡ The same objection applies to the previous sanction of the local Government for criminal proceedings against executive or police officers under them §

Good faith is no excuse in England

Thirdly excessive action is punishable by English courts of law even if such action is done in good faith Dicey points out for example that a soldier cannot any more than a civilian avoid responsibility for breach of the law by pleading that he broke the law in *bona fide* obedience to the orders (say) of the Commander in Chief He may as it has been well said be liable to be shot by a court martial if he disobeys an order and to be hanged by a judge and jury if he obeys it ‖ Good faith is no valid excuse in England for unlawful acts committed by soldiers or executive or police officers in dispersing a crowd or in quelling disturbances and there is no reason why similar officers in India should be specially protected on the mere pretext of good faith

* Sastri Kamala Lectures (Cal University Publication) p 70

† *Ibid* p. 71

‡ The Governor-General in Council gave his sanction for legal proceedings against a number of British soldiers of the King s Liverpool Regiment who were alleged to have raided a village in the Central Provinces and committed assaults on the villagers

§ *Cf* the provisions of sec 271 of the 1935 India Act sec 197 of Cr P C and sections 80-82 of the Civil Procedure Code

‖ Dicey: Law of the Constitution p 299

and charged with any crime, (unless committed for treason or felony or as accessory to any felony, or unless convicted or charged in execution of legal process) the Lord Chancellor or any of the judges in vacation must award a *habeas corpus* returnable immediately before himself or any other judge On service of the writ the prisoner had to be brought up before the court by the gaoler on whom the writ had been served The gaoler was required to state the true cause of commitment, and if the prisoner, in the opinion of the court, was entitled to a bail he had to be discharged within two days on giving security (2) that the writ was required to be returned and the prisoner brought up within twenty days after service of the writ (3) that no person once discharged under the writ of *habeas corpus* could be recommitted for the same offence (4) that persons committed for treason or felony might claim to be indicted in the next term or session or else be admitted to bail unless the King s witnesses could not then be produced and if acquitted or not indicted and tried in the second term or session had to be discharged (5) that the writ might be obtained from the Courts of Chancery Exchequer King s Bench and Common Pleas and could not be denied under penalty of £ 500 forfeit to the person aggrieved and (6) that subject to certain exceptions no inhabitant of England could be deported as a prisoner to Scotland Ireland, Jersey Guernsey or any places beyond the seas

Some defects persist which subsequent Acts remove

This Act left room for improvement It will be seen, for example that it did not fix up the amount of the bail mentioned therein that it did not provide safeguard against falsehood in the return and that it applied only to persons charged with criminal offences So far as the first defect was concerned, it was removed by the Bill of Rights which provides that excessive bail ought not to be required Under George III another Habeas Corpus Act was passed in 1816 * This Act extended the procedure of relief to persons imprisoned or committed on a civil matter It provided for the issue and return of the writ in vacation as well as during term time Lastly, it empowered the Court to enquire

* 56 Geo III C 100

into the truth or falsity of the statement made in any return to a writ of *habeas corpus* In 1862 the third Habeas Corpus Act* was passed introducing as it did certain new principles It provides that no writ of *habeas corpus* should issue out of England to any part of the Crown's possessions or dominions where there is a court authorised to issue it Subject to that limitation, a writ from a competent English Court runs throughout the whole Empire It has, however, been held that the restriction of the 1862 Act cannot be used for preventing the issue of a writ to the Secretary of State for the Colonies in respect of detention in a British Portectorate of a native Chief under a local Ordinance † The Habeas Corpus Acts do not apply to Scotland where protection is afforded by an Act of 1701 which has been supplemented by the Criminal Procedure (Scotland) Act of 1887 and the Bail (Scotland) Act of 1888

The securities for freedom practically complete in England

It is suggested that "the securities for personal freedom are in England as complete as laws can make them" "The right to its enjoyment," observes Professor Dicey, "is absolutely acknowledged,‡ any invasion of the right entails either imprisonment or fine upon the wrong-doer, and any person, whether charged with crime or not, who is even suspected to be wrongfully imprisoned, has, if there exists a single individual willing to exert himself on the victim's behalf, the certainty of having his case duly investigated, and, if he has been wronged, of recovering his freedom" But the force of this argument has been considerably weakened by the trend of modern legislation as Professor Dicey himself admits § There is, however, reluctance to interfere arbitrarily with personal freedom and with the ordinary procedure of judicial trial,||

* 25 & 26 Vict, c 20

† R *v* Crewe, Sekgome, Ex parte, (1910), 2 K B 576

‡ Dicey The Law of the Constitution, p 216

§ *Ibid*, Introduction, XXXVIII XLVIII

|| Regret was expressed by the Home Secretary in April, 1934, for interference by the Secretary, Scotland Yard, with the due course of judicial proceedings In 1924 the alleged interference with the prosecution of a communist led to the defeat of the Labour Government The Crown may through the Attorney General stay proceedings in *any criminal prosecution and perhaps also in civil suits by nolle prosequi* at its discretion without calling upon the prosecutor to show cause

although it has been held that action by the executive in exercise of the discretionary power vested in them by law is not by itself inconsistent with the rule of law * But there is no denying the fact that such action resulting in the curtailment of personal liberty is contrary to the spirit of the English law, † and that view was taken by Lord Shaw in connection with a statutory regulation authorising the executive to imprison a naturalised citizen as a person of hostile origin and association Note should also be taken of the doctrine that an alien engaged during the war in hostile activities against the Crown in Ireland is entitled to the same protection in law as a British subject, ‡ and of the interesting case of Art O Brien § who was set at liberty on application to a competent English Court

The Habeas Corpus Acts have invested the judiciary with the power of curbing executive excesses and of supervising and controlling administrative measures designed to attack the personal liberty of the King s subjects It may be that the judiciary in England is not frequently called upon to exercise the powers conferred upon it The reason for it is not that the judiciary has ceased to be vigilant or watchful but the reason is that the knowledge of the existence of the power tends to govern the conduct of the administration and has had a sobering effect on its policy The authority of the judges has also curtailed in a substantial measure the discretionary powers of the Crown and its Ministers The Home Secretary cannot put persons whom he considers conspirators under arrest and he has no right to expel them from the country or from one part of the country to another He has to place them on trial before a regular court of law The Prime Minister s affidavit or the Home Secretary s certificate that the arrest of a particular person or persons is demanded and warranted by the

* Anson The Law and Custom of the Constitution (edited by Keith) Vol II I 4 I p 296

† R v Halliday Zadig Ex parte (1917) A.C 260

‡ Johnstone v Pedlar (1921) 2 A C 262.

§ R. v Secretary of State for Home Affairs O Brien Ex parte (1923) 2 K B 361

highest considerations of public safety is no answer whatsoever to the demand for freedom under a writ of *habeas corpus* *

In emergencies *habeas corpus* suspended

But in times of grave disorder justifying emergency measures the judiciary is prevented by the Habeas Corpus Suspension Act from restricting the authority of the executive Government The Suspension Act renders it impossible for any person or persons imprisoned under warrant by the Home Secretary on a charge of high treason or on suspicion of high treason, to claim the right of being either discharged or put on trial

Indefinite detention ruled out

It does not mean, however, that the right to personal freedom of any person not imprisoned on the charge mentioned above is in any way affected Moreover, the Act does not legalise arrest or imprisonment which had not been considered lawful before it was passed Again the Suspension Act is an annual Act which means that if it is to continue in force after the lapse of a year, it has to be given a fresh lease of life by Parliament † So indefinite detention of persons suspected by the police or the executive is practically ruled out in England The effect of any Suspension Act is that the Government of the day may for the period during which that Act is in force "defer the trial of persons imprisoned on the charge of treasonable offence" and not on any other charge or charges By the Defence of Realm Act, 1914, however, detention of persons suspected of hostile affiliations, even if of British nationality, was authorised. An Indemnity Act was passed to indemnify official acts and all forms of illegal action taken during the war

The scope of *habeas corpus* in India

Personal liberty in India by the *habeas corpus* procedure is sought to be protected not by any specific provisions in the Government of India Acts of 1919 and 1935, but by section 491 of the Criminal Procedure Code It was originally laid down that any of the Presidency High Courts might, whenever it thought fit, direct that a person within the limits of its ordinary original civil

* *Cf* Professor Keith s edition of Anson's The Law and Custom of the Constitution, Vol II, Part I, p 302

† 34 Geo III, c 54, 41 Geo III, c 61

jurisdiction must be brought before the court to be dealt with according to law The High Court might direct also that a person illegally or improperly kept in detention in public or private custody within such limits must be set at liberty It was given power further to frame rules from time to time to regulate the procedure in cases coming within the purview of this section

The old law amended in 1923

The position to-day is not the same as it was until 1923 when the original law was amended Under the old law the Presidency High Courts* only had power to issue writs of *habeas corpus* and their orders were valid within the limits of their ordinary original civil jurisdiction† whereas under the present section the power to issue a writ belongs to all High Courts and their jurisdiction extends to all *muffassil* areas ‡ Again sections 456-458 now repealed gave European British subjects certain privileges which were denied to British Indian subjects The remedy guaranteed to the former under section 456 was far more extensive than that provided for the latter When any European British subject for example was unlawfully detained in custody by any person such European British subject or any person on his behalf might apply to the High Court having jurisdiction over such European British subject in respect of any offence committed by him at the place where he was detained or to which he would be entitled to appeal from any conviction for any such offence for an order directing the person detaining him to bring him before the competent High Court and to abide by such order as it might pass So far as British India is concerned the amendment of the law has now placed European and Indian British subjects on a base of equality § There is however still some discrimination maintained as between these two classes of subjects under section 491 (A) This section confers upon the High Courts established by Letters Patent the power to issue writs for the benefit of European British subjects applicable to such territories as the Governor-General in Council may specify As Woodroffe J

* Calcutta Bombay and Madras.

† 44 Cal 76 40 Cal. 59

‡ 49 M L J 306 The writ of *habeas corpus* by statute now applies in areas covered by the appellate criminal jurisdiction of any High Court

§ Sections 456-58 are now incorporated in sections 491 and 491 A

State Prisoners Act of 1858 Nor does the law of *habeas corpus* apply to persons arrested or detained under what is called the Bengal Criminal Law Act of 1932 as amended up to 1934 which has established the principle of arrest without warrant and detention without trial and to those who are restrained under the Bengal Suppression of Terrorist Outrages Act of 1932 as amended up to 1934 and the rules made thereunder unless it is held that these Bengal Acts and rules are *ultra vires* of the local legislature under sub-section (4) of Sec 80A of the Government of India Act *

IV Safeguards against social disabilities

A charter of fundamental rights is of little or no value unless it contains ample safeguards against numerous social disabilities from which a considerable body of the Indian people have been suffering for centuries past The peculiar circumstances of the country require them although the spread of education is appreciably breaking the barriers of caste and untouchability In this connection the scheme submitted by Dr Ambedkar and Mr Srinivasan to which reference has already been made deserves special attention

A mere statement of fundamental rights not adequate.

Dr Ambedkar and his colleague have stated on behalf of the depressed classes that they are prepared to place themselves under a majority rule in a self governing India on certain conditions Those conditions are equal citizenship free enjoyment of equal rights, protection against discrimination adequate representation of the depressed classes in the legislature and the services and the executive Government † proper and effective safeguards for the

* *Cf* pp 857-62 *supra* The question of validity of these laws loses much of its practical force from April, 1937 when the India Act of 1935 comes into operation with respect to the Provinces

† The Poona Pact signed on September 21 1932 by Mahatma Gandhi Dr Ambedkar Sir Tej Bahadur Sapru Pandit Madan Mohan Malaviya and other Hindu leaders declares (Clause 8) that there shall be no disabilities attaching to anyone on the ground of his being a member of the Depressed Classes in regard to any elections to local bodies or appointment to public services. Every endeavour shall be made to secure fair representation of the Depressed Classes in those respects subject to such educational qualifications as may be laid down for appointment to public services.

protection of minority interests and the creation of a Special Department for the purpose As we have said, the depressed classes have been subjected to grave social wrongs under the Hindu polity In certain places they are looked down upon as *pariahs* who, according to orthodox Hindu opinion, pollute water by touching it and desecrate temples by entering them They are treated as something less than human beings born, as it were to social bondage and to hew the wood and draw the water for the benefit of the upper classes Dr Ambedkar and Mr Srinivasan are right when they say that a mere statement of the fundamental rights in the constitution laying down equal citizenship and promising enjoyment of equal rights constitutes no effective remedy against social injustice They propose, therefore, that the declaration of rights should be protected by adequate pains and penalties for interference with the enjoyment of those rights By way of illustration they refer to the Civil Rights Protection Acts of 1866 and 1875 passed in the United States of America for the protection of the interests of the Negroes after their emancipation and suggest that the clause dealing with the infringement of citizenship rights in the U S A law should also find place in the Government of India Act †

Special difficulties of the depressed classes

They then proceed to point out certain difficulties which, they fear, are likely to arise in connection with the free enjoyment by the depressed classes of the rights stated in the constitution The first difficulty is the possibility of the application of open violence against them by the orthodox Hindus This fear, they themselves admit, is groundless inasmuch as they will have the protection of law The second difficulty arises

* *Cf* pp 200 01, *supra*

† The clause proposed to be incorporated in the constitution reads thus "Whoever denies to any person except for reasons by law applicable to persons of all classes and regardless of any previous condition of untouchability, the full enjoyment of any of the accommodations, advantages, facilities, roads, paths, streets, tanks, wells, and other watering places, public conveyances on land, air or water, theatres or other places of public amusements, resorts or conveniences, whether they are dedicated to or maintained or licensed for the use of the public, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine"

from economic dependence of the depressed classes upon the caste Hindus who are generally better off than the former The latter, it is pointed out are liable to use their economic power against the scheduled castes Apart from open violence and economic dependence there is another weapon far more effective and that is what is called the social boycott Dr Ambedkar and Mr Srinivasan think that the method of violence pales away before it for it has the most far reaching and deadly effect They quote from the report of a Committee appointed by the Bombay Government in 1928 to enquire into the educational economic and social conditions of the untouchables and of the aboriginal tribes in that Presidency and to recommend measures for their uplift In the opinion of the Committee which Dr Ambedkar and his colleague share the social boycott is the more dangerous because it passes as a lawful method consistent with the theory of freedom of contract They hold that there can be no freedom of speech and action so essential to the advancement of the depressed classes unless this kind of tyranny of the majority is firmly dealt with We find them advocating that social boycott should be made a criminal offence punishable under law They have suggested detailed legal provisions in this regard on the lines of the Burma Anti Boycott Act 1922

Special provisions proposed to remove the difficulties

Dr Ambedkar and Mr Srinivasan point out that in order that the interests of the scheduled castes may not be neglected and prejudicially affected a clause like Section 93 of the British North America Act should be incorporated in the Government of India Act making it obligatory upon the competent authorities to make adequate provisions for the education sanitation and other matters of social and political advancement of the depressed classes * and to specify measures of relief against possible violations of those safeguards The procedural part of the clause by which overriding powers are proposed to be conferred upon the Governor General and the Secretary of State raises a

* The Poona Pact contains a clause (Clause 9) which lays down that in every province out of educational grants an adequate sum shall be earmarked for providing educational facilities to members of the Depressed Classes By Sec. 83 of the 1935 Act special provisions have been made with respect to educational grants for the benefit of the Anglo-Indian and European communities

constitutional issue of great importance on which there is likely to be an acute difference of opinion among politicians in view of India's demand for equality of status with the United Kingdom and the self-governing Dominions of the British Commonwealth. It will be seen that the Statute of Westminster passed amidst the Indian Round Table controversies and particularly provisions of local legislation in at least one of the Dominions have left no discretionary powers in the hands of the Governor-General. We think that the position of India should be approximated to that of the Dominions, as far as possible, in this matter.*

The proposal for a depressed classes department

As regards the proposal for the creation of a special department to look after the rights and interests of the depressed classes, it is suggested that the Minister in charge should, like all other Ministers, be held responsible to the legislature. We do not see any logic in the statutory creation of a new portfolio, particularly when the advocates thereof are of opinion that the Minister in charge should be a member of the Cabinet and be amenable to legislative control. We think that a declaration of rights with adequate penalties for offences is sufficient for the purpose in view, and such declaration, as has already been emphasised, should find place in the constitution especially for the protection of the social, religious and linguistic rights of minorities.

There has also been a demand for a charter of economic rights. Mr. Sastri discussed the subject in some detail in his Kamala Lectures and laid under contribution the German constitution, and at the Indian Round Table Conferences also some spokesmen of labour dealt with the subject. It is not necessary here to give an exhaustive table detailing the heads of rights,† our

* *Cf.* Chapter XVI, *infra*.

† The Congress formula accepted at the Karachi session held in March, 1931, deserves careful study. The Congress declares that any constitution that may be agreed to on its behalf should enable the Swaraj Government to provide "fundamental rights of the people such as (*a*) freedom of association, (*b*) freedom of speech and Press, (*c*) freedom of conscience and free profession and practice of religion subject to public order and morality, (*d*) no disability to attach to any person by reason of religion, caste or creed in regard to public employment, office of power or honour and exercise of

purpose has been to indicate in broad outline the nature of the fundamental rights and the method by which they may be protected

Conclusion

His Majesty's Government have objected to giving statutory expression to any large range of declarations bearing on fundamental rights But they are satisfied that certain provisions of this kind such, for instance as those dealing with personal liberty and rights of property and eligibility of all subjects for public offices regardless of differences of caste, religion etc can appropriately and should, find a place in the Constitution Act They have proposed also that when the King will make a pronouncement inaugurating the new constitution His Majesty may be advised that such a pronouncement might give expression to some of the propositions which have been put forward at the Round Table Conferences in connection with a declaration of fundamental rights and which prove unsuitable for statutory enactment * Almost the same view has been taken by the Joint Parliamentary Committee and where they have differed from the White Paper, they have been more critical than the authors of that document about the utility of a declaration of fundamental rights †

Prohibitions and immunities in the 1935 Act

The arguments adduced by Lord Linlithgow and his colleagues against a statutory declaration of rights were anticipated by Sir P S Sivaswamy Aiyer and have already been answered in these pages Now a series of prohibitions are embodied in

any trade or calling (e) equal rights to all citizens of access to and use of public roads, public wells and all other places of public resort and (f) the right to keep and bear arms in accordance with regulations made in that behalf and such reservations as may be required for public safety The resolution contains 19 other items covering a wide range and variety of subjects. The Maharajah of Travancore's Proclamation of November 1936, throwing open all Government-controlled temples offers a solution which must encourage hope In the campaign against social injustice however public temples must be distinguished from private places of worship It is not proper to interfere by legislation or otherwise with freedom of private worship

* White Paper para. 75 of the Introduction

† J P C Report paras. 366 & 367

Sections 298-300 of the Government of India Act, 1935, which Professor Keith interprets as taking the place of a declaration of rights as contemplated in the persistent Indian demand in that behalf at the Round Table Conferences. Prohibitions are also cited in Section 111, but the grounds specified in Section 298 are restricted as compared with those in Section 111.* The protection as regards personal law and custom of a community sought to be provided in clause (b) of sub-section (2) of Section 298 is in a large measure undermined by the provisions in section 301 of the Act repealing Section 18 of the East India Company Act, 1780, and Section 12 of the East India Act, 1797, which contained savings for native law and custom. The repeal is unfortunate, and if the relevant sections were "obsolete," there was no ground for raising a controversy by repeal of the savings. If they were not "obsolete," the protection now withdrawn is admittedly unjust to the communities concerned. Nor does the equality of treatment in respect of public appointments seem to be effective in view of sub-section (3) of Section 298 which relies on the special responsibilities of the Governor-General and the Governor† for safeguarding the interests of minorities. Such responsibilities may be necessary in India's present circumstances and having regard to the inefficiency of certain minority communities, but doubt may be entertained as to whether in law they do not derogate from the general protection embodied in the Act. It is not quite correct to assert, as Professor Keith does,‡ that the provisions in these sections are analogous to declarations of fundamental rights in their scope, bearings and incidence.

It appears that two considerations have weighed with Parliament and His Majesty's Government in the United Kingdom in rejecting the Indian demand in that behalf. First, it was apprehended that statutory declarations of rights would affect the position of the Indian Princes *vis-a-vis* their subjects who are more or less subject to personal and despotic rule and not to the rule of law. To that the answer is that savings could have been

* *Cf* clause (b) of sub section (1) of Sec 111 and sub section (1) of Sec 298

† Ss 12 & 52

‡ A Constitutional History of India, p 383

inserted for the Princes and further that there was no reason to make that concession to them in view of their proposed entry into the Indian federation Secondly, the fear was entertained contrary to their own doctrine that declarations of rights were not legally enforceable, that they would by implication vest power in the competent courts to pronounce upon the validity or constitutionality of laws and administrative measures The United States Supreme Court s overruling of Federal and State laws perhaps served as a warning to the authors of the 1935 India Act

A record of broken pledges

The position taken up by His Majesty s Government and the Joint Parliamentary Committee and the provisions of the 1935 India Act do not take us very far, for already some of these provisions have been incorporated in statutes e g the law relating to the writ of *habeas corpus* and eligibility for public offices Moreover Royal proclamations issued from time to time have given expression to many of these propositions in clear and definite language But it is widely believed that the record of the British administration in India does not show that the sentiments expressed in the proclamations have been followed up in actual working and that the statutory provisions in this respect have been scrupulously observed By section 87 of the Charter Act of 1833 it was provided that no native or natural born subject of the Crown resident in India should by reason only of his religion place of birth descent colour, or any of them be disqualified for any place or office in the Company s service The same fine sentiment was expressed in the Proclamation of 1858 But as Professor Keith points out,* it was not of practical importance, for nothing was done despite the views of high authorities, until at a very late stage, to remove the relevant section of the Act of 1793 which reserved public offices worth over £ 500 a year for covenanted servants The office of Executive Councillors of the Governor General and the Governor s Councils was thrown open to Indians only on the inauguration of the Morley Minto Constitu

* A Constitutional History of India p. 156

tional Reforms in 1909,* and only in one case has up to the present moment an Indian been appointed to a Provincial Governorship It is true that all the propositions which have been put forward for insertion in the Act will not be legally enforceable, but, as we have said, whether justiciable or not, the provisions which may be incorporated in the Constitution are likely to give them an authority and perhaps a sanction which the existing arrangements seem to lack

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* Note King Edward VII's opposition to the appointment of an Indian in the Viceroy's Cabinet, a view which King George V shared as Prince of Wales The King yielded to the Cabinet which unanimously urged acceptance of Lord Morley's proposal to appoint Mr Sinha (afterwards the first Baron Sinha of Raipur), but His Majesty desired that his protest should remain on record (Lee Edward VII, ii 285-89)

CHAPTER XIV

THE PROBLEM OF COMMUNAL REPRESENTATION

The Moslem case for separate representation.

No question has given rise in India to a more acute and bitter controversy than the problem of electorates and communal representation A considerable body of Mahomedan opinion has expressed itself strongly and unequivocally in favour of separate electoral registers and it is backed generally by the European community and by a certain section of what are called the depressed classes Hindu opinion is against it as also that section of Mahomedan opinion which has identified itself with the Indian National Congress As we have shown in a preceding chapter,* Mahomedans as a class insist upon separate electorates, weightage in those provinces where they are in a minority and a statutory majority in those provinces where they form the majority They base their claims on their historical past and on the promises and pledges held out from time to time by British and Indian statesmen They recall with pride the great part they have played in the history of the country and are anxious that adequate provision should be made in the constitution for representation of their interests in the legislatures adequate to their numerical strength and commensurate with their past records They feel that under a system of joint electorates their interests political economic linguistic and cultural, are bound to suffer on account of the numerical strength of the Hindus and the latter s advantageous position in the economic sphere and social polity

Early promises to Moslems made by British statesmen.

There is no doubt that on various occasions British statesmen have assured Mahomedans that their interests would be properly safeguarded in the constitution Lord Kimberley, for instance, speaking on the India Councils Bill, 1892, in the House of Lords stated It has been found

* Chapter XIII *supra*.

in this country not very easy to protect the interests of minorities by any contrivance that can be devised; but there must be found some mode in India of seeing that minorities, such as the important body of Mahomedans who are frequently in a minority in parts of that country are fully represented " There was, however, no provision made for communal representation in the Councils Act of 1892 But Mr Curzon (afterwards Lord Curzon) referring to clause I* of the Councils Bill expressed the view that it would " afford the means by which representatives of the most important sections of native society may be appointed to the Councils "†

In 1906 an All-India Moslem deputation led by His Highness the Aga Khan waited upon Lord Minto, who was then the Governor-General of India, to represent the Moslem demands In reply to the address presented to his lordship, the Viceroy made the following announcement ‡

> " The pith of your address, as I understand it, is a claim that under any system of representation, whether it affects a Municipality or a District Board or a Legislative Council, in which it is proposed to introduce or increase an electoral organisation, the Muslim community should be represented as a community You may point out that in many cases electoral bodies as now constituted cannot be expected to return a Muslim candidate, and that if by chance they did so, it could only be at the sacrifice of such a candidate's views to those of a majority opposed to his community whom he would in no way represent, and you justly claim that your position should be estimated, not only on your numerical strength, but in respect to the political importance of your community and the service it has rendered to the Empire "

Lord Minto, however, was careful at the same time to sound a note of warning to the deputation, for in explaining his position

* " The Governor General-in Council may from time to time with the approval of the Secretary of State in Council make such regulations as to the conditions under which such nominations (that is the nomination of additional members), or any of them shall be made by the Governor General, Governors and Lieutenant Governors respectively, and shall prescribe the manner in which such regulations should be carried into effect "

† Keith Speeches and Documents on Indian Policy (Oxford University Press), Vol II (1858-1921)

‡ Speeches by the Earl of Minto, 1905 10, pp 65 70,

he spoke thus "Please do not misunderstand me I make no attempt to indicate by what means the representation of communities can be obtained"

Lord Minto's reply to the Muslim deputation was reaffirmed in the Government of India letter No 23310-17 dated the 24th of August, 1907 addressed to the local Governments The Government of India suggested for consideration of those Governments the adoption of the following measures First in addition to the small number of Mahomedans who might be able to secure election in the ordinary manner it was desirable in each of the Councils to assign a certain number of seats to be filled exclusively by Mahomedans Secondly, for the purpose of filling the other seats or a proportion of them special Mahomedan electorates might be constituted *

The Government of India Despatch supports separate electorates

A year later, i e in October, 1908 Lord Minto's Government sent a despatch to the Secretary of State on the subject of Indian constitutional reforms † As regards representation of communal interests in legislative bodies the despatch traced the history of the question and quoted extensively from the observations of Lord MacDonald Lord Dufferin Lord Kimberley, Mr Gladstone Sir William Plowden and Sir Richard Temple, who emphasised at one time or other the diversities of races religions and pursuits in India and spoke in some form or other in favour of separate representation of minorities It referred also to the views expressed by the local Governments on the subject and pointed out that in the judgment of the Government of India the papers submitted by those Governments bore out to the fullest extent the conclusion that "representation by classes and interests is the only practical method of embodying the elective principle in the constitution of Indian Legislative Councils"

The late Mr Gokhale agreed substantially with the views of the Government of India on the question of Muslim representation Speaking from his place in the Imperial Legislative Council

Mr Gokhale's approval of the scheme.

* P Mukherjee: Indian Constitutional Documents, Vol. I p 260

† Parliamentary Papers (Accts and Papers) Advisory and Legislative Councils Vol LXXVI Part I 1908 pp 33-37

on March 29, 1909, he observed "I think the most reasonable plan is first to throw open a substantial minimum of seats to election on a territorial basis in which all qualified to vote should take part without distinction of race or creed And then supplementary elections should be held for minorities which numerically or otherwise are important enough to need special representation, and this should be confined to members of minorities only "*

Lord Morley's gesture to the Muslims

In January 1909, the late Mr Ameer Ali led a deputation of Mahomedans and introduced it to Lord Morley and, in the course of the address, the deputation repeated the demands made three years ago by His Highness the Aga Khan The Secretary of State in reply referred to his despatch and said

> "The aim of the Government and yours is identical—that there shall be " adequate, real and genuine Mahomedan representation " Now where is the difference between us? The machinery we commended, you do not think possible What machinery? Mixed electoral colleges Well, as I have told you, the language of the despatch does not insist upon a mixed electoral college It would be no departure in substance from the purpose of our suggestion that there should be a separate Mahomedan electorate—an electorate exclusively Mahomedan "†

Speaking on the India Councils Bill, 1909, in the House of Lords in February of the same year Lord Morley in analysing the Muslim demand observed

> "The Mahomedans demand three things They demand the election of their own representatives to these Councils in all the stages just as in Cyprus, where, I think, the Mahomedans vote by themselves They have nine votes and the non-Mahomedans have three or the other way about So in Bohemia, where the Germans vote alone and have their own register Therefore, we are not without a precedent and a parallel for the idea of a separate register Secondly, they want a number of seats in excess of their numerical strength

* Proceedings of the Governor General's Council, 1908 09, Vol XLVII, pp 210 18-
† Morley's Indian Speeches (1907 09), pp 104 06

> Those two demands we are quite ready and intend to meet in full There is a third demand that if there is a Hindu on the Viceroy s Executive Council there should be two Indian members of the Viceroy s Council and that one should be a Mahomedan Well as I told them and as I now tell your lordships I see no chance whatever of meeting their views in that way to any extent at all *

Mr Asquith s reading of Indian history

On the second reading of the same Bill in the House of Commons Mr Asquith (afterwards the Earl of Oxford and Asquith) made the position of His Majesty s Government perfectly clear He said

> Undoubtedly there will be a separate register for Muslims To us here at first sight it looks an objectionable thing because it discriminates between people and segregates them into classes on the basis of religious creeds I do not think that is a very formidable objection The distinction between Muslims and Hindus is not merely religious but it cuts deep down not only into the tradition and historic past but into the habits and social customs of the people †

The system of communal electorates adopted in 1909

Thus His Highness the Aga Khan and Mr Ameer Ali won the day The India Councils Act, 1909, laid down that the additional members of the Councils of the Governor-General Governors and Lieutenant-Governors of the provinces instead of being all nominated in a manner provided by the Indian Councils Acts of 1861 91 should include members so nominated and also members elected in accordance with regulations made under this Act ‡ Regulations were made and issued by the Governor General on November 15 1909

* Keith Speeches and Documents on Indian Policy Vol II (Oxford University) pp. 92-93. Parliamentary Debates—Lords 1909 Vol I.

† P Mukherjee Indian Constitutional Documents Vol. I p 343. Parliamentary Debates (Official Report) Commons 1909 Vol III, pp 529-87

‡ The additional members of the Councils for the purpose of making laws and regulations (hereinafter referred to as Legislative Councils) of the Governor-General and of the Governors and the members of the legislative Councils already constituted or which may hereafter be constituted of the several Lieutenant Governors of Provinces instead of being all nominated by the Governor General Governor or Lieutenant-Governor in a manner provided by the Indian Councils Acts 1861 and 1892 shall include members

by which the Mahomedans were given separate representation Those regulations were subsequently amended during the period 1912-1913, but the provision for communal representation was throughout retained

The period between 1909 and 1919 is one of exceptional interest

The next stage of constitutional development in this country was a period of exceptional interest and excitement It covers approximately ten years dating from the Councils Act of 1909 down to 1919 when dyarchy was proposed to be installed in the provinces and the Central legislature to be enlarged and its powers and functions extended under the Government of India Act During this period the partition of Bengal was annulled healing the wound from which Bengal had suffered for a number of years, the Great European War broke out leading as it did to a searching of hearts among individual politicians and nations and giving rise in the trenches to new hopes and aspirations, the conception of imperial unity received a new orientation and the nations of the world were sought to be brought into closer contact with one another by the foundation of the League of Nations at Geneva. India made a striking response by contributions in men and money to the Empire's call for the defence of the rights of men and of nations. The response was graciously recognised by His Majesty's Government and statements were made in Parliament and outside promising her a large measure of self-government. The talk of constitutional reforms was in the air and politicians were busy homologating and hammering out specific proposals for constitutional development

Mr Gokhale's "Last Will and Testament"

It was at this time that the late Mr Gokhale submitted a scheme which has been called his Last Will and Political Testament in which the problem of constitutional reforms was discussed in broad outline Mr Gokhale approved of the principles of communal representation in the legislature and observed that

so nominated and also members elected in accordance with regulations made under this Act, and references in those Acts to the members so nominated and their nomination shall be construed as including references to the members so elected and their elections" [Edward VII, Chapter IV, Section I (1)]

there would be the special representation of Mahomedans and here and there a member may have to be given to communities like the Lingayats where they are strong * Mr Gokhale s scheme was followed up in October, 1916, by the memorandum of 19 elected members of the Imperial Legislative Council It emphasised that the franchise should be broadened and extended directly to the people, Mahomedans or Hindus, wherever they are in a minority being given proper and adequate representation having regard to their numerical strength and position

The Congress-League Pact of 1916

We then come to the Congress League agreement of December 1916, popularly known as the Lucknow pact It laid down that adequate provision should be made for the representation of important minorities by election, and that the Mahomedans should be represented by special electorates on the Provincial Legislative Council Thus for the first time communal representation through separate electorates was accepted in a joint Hindu Moslem formula The scheme proposed for Mahomedan representation was as follows

Punjab	One half of the Indian elected members			
United Provinces	30 per cent	Do	Do	Do
Bengal	40 per cent	Do	Do	Do
Behar	25 per cent	Do	Do	Do
Central Provinces	15 per cent	Do	Do	Do
Madras	15 per cent	Do	Do	Do
Bombay	One third	Do	Do	Do

The proposed constitution of the Imperial Council.

It is clear that so far as Bengal and the Punjab were concerned Mahomedan representation as proposed was not adequate to their numerical strength and that that fact did not prevent the Mahomedans from signing the pact † It should be noted further

* Keith : Speeches and Documents on Indian Policy Vol. II pp 122-23.

† The Lucknow pact was passed at the 31st session of the Indian National Congress held at Lucknow in December 1916 and adopted by the All-India Moslem League at its meeting held in the same place that year

that the arrangement in the scheme was that "Mahomedans shall not participate in any of the other elections to the Legislative Councils" But it was stated also that "no Bill, nor any clause thereof, nor a resolution introduced by a non-official member affecting one or the other community, which question is to be determined by the members of that community in the Legislative Council concerned, shall be proceeded with, if three-fourths of the members of that community in the particular Council, Imperial or Provincial, oppose the Bill or any clause thereof or the resolution" It was recommended further that "the members of Councils should be elected directly by the people on as broad a franchise as possible" thereby anticipating, if rather vaguely, the much canvassed scheme of adult suffrage

With regard to the Imperial Legislative Council the pact suggested.

(1) That its strength should be 150,
(2) that four-fifths of the members should be elected, and
(3) that the franchise for the Imperial Legislative Council should be widened, as far as possible, on the lines of the Mahomedan electorates, and the elected members of Provincial Legislative Councils should also form an electorate for the return of members to the Imperial Legislative Council

The views expressed in Montford Report

The history of the problem now brings us to the joint report signed by the late Mr Montagu and Lord Chelmsford The distinguished authors discussed the question of separate electorates at considerable length in their report They observed

"The Mahomedans regard separate representation and communal electorates as their only adequate safeguards But apart from a pledge which we must honour until we are released from it, we are bound to see that the community secures proper representation in the new Councils How can we say to them that we regard the decision of 1909 as mistaken, that its retention is incompatible with progress towards responsible government, that its reversal will eventually be to their benefit, and that for these reasons we have decided to go back on

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> it? Much as we regret the necessity we are convinced that so far as the Mahomedans at all events are concerned the present system must be maintained until conditions alter even at the price of slower progress towards the realisation of a common citizenship But we can see no reason to set up communal representation for Mahomedans in any province where they form a majority of the voters *

Implications of the recommendations of Mr Montagu and Lord Chelmsford

It is not difficult to deduce certain conclusions from the views expressed by the late Mr Montagu and Lord Chelmsford It is clear that, according to them the perpetuation of communal representation by separate electoral registers is inimical to the growth and development of a common nationality As a matter of fact they admitted that the history of self government among nations who developed it and spread it throughout the world is decisively against the admission by the State of any divided allegiance, against the State arranging its members in any way which encourages them to think of themselves primarily as citizens of any smaller unit than itself † Again they pointed out that a minority which is given special representation owing to its weak and backward state is positively encouraged to settle down into a feeling of satisfied security and that the give and take which is the essence of political life is lacking ‡ At the same time they observed that the Mahomedans were given special representation with separate electorates in 1909, that the Hindus acquiescence is embodied in the present agreement between the political leaders of the two communities and that the Mahomedans regard these as settled facts But the joint authors it must be clearly understood recommended the adoption of separate electorates with reluctance and that as a transitional measure What is much more important in this connection is however the definite statement made by them that in provinces where the Mahomedan voters are in the majority they should have no separate representation

* The Montford Report para 231
† *Ibid* para 228
‡ *Ibid* para 230

Lord Chelmsford doubts the utility of separate electorates

That Lord Chelmsford was opposed to communal representation by means of separate electorates is clear from the speech that he made in opening the Imperial Legislative Council in September, 1918 Referring to the Montagu-Chelmsford Report his lordship said

"We wished indeed to make it clear that in our opinion communal electorates were to be deprecated But it was in the main to the method of securing communal representation by communal electorates that we took exception, and not to communal representation itself I am most anxious that the fullest representation should be secured to the various classes and communities in India, but I am frankly doubtful myself whether the best method for securing that representation is through a system of separate electorates"

The Joint Parliamentary Committee prefer the principle of proportional representation

The subject came up before the Joint Committee of both Houses of Parliament appointed to consider the Government of India Bill The Committee proposed that in the Madras Presidency* the non-Brahmins should be given, through separate representation, reservation of seats, that similar treatment should be accorded to the Marhattas of the Bombay Presidency† and that the recommendation of the Franchise Committee in respect of proportionate representation of Mahomedans, based on the Lucknow Pact, should be accepted ‡ Lord Selborne and his colleagues further observed that "the principle of proportional representation may be found to be particularly applicable to the circumstances of India," and they recommended that the question should be fully explored "so that there may be material for consideration by the Statutory Commission when it sits at the end of ten years"§

* Report of the Joint Select Committee, cl 7 (*c*)

† *Ibid*, cl 7 (*d*)

‡ Cl 7 (*m*)

§ Cl 7

Rules were thereafter made under the Government of India Act providing communal representation by means of separate electorates both for the provinces and the Central legislature In 1922 communal electorates were finally approved by Parliament for Indians Anglo-Indians and Europeans in Burma

The Muddiman Reforms Enquiry Committee opposed to abolition of separate electorates

The matter also came up before the Muddiman Enquiry Committee in 1924 The majority of the Committee expressed the view that the abolition of any special communal electorates was quite impracticable and that they were not therefore prepared to recommend the substitution in whole or in part of reservation of seats for separate electorates The minority substantially agreed with their colleagues and pointed out that in the present conditions it is unavoidable that due regard must be paid to communal interests and that they should be adequately safeguarded by provisions in the constitution *

Some local Acts accept the principle of communal representation.

After the introduction of the Reforms Act in 1919 some of the provinces namely Bengal Bombay the United Provinces and Assam passed Acts introducing communal representation into public bodies In this connection the United Provinces District Boards Act 1922 and the Bombay Municipal Act 1925 may be cited as instances in point It may be noted also that the late Sir Surendranath Banerjea was the author of the Calcutta Municipal Act† and Pandit Jagat Narayan of the District Boards Act of the United Provinces

Mr C R Das s Bengal Pact makes concessions to Mahomedans.

Now we come to the famous Pact known as the Bengal Pact of 1923 for which the late Mr C R Das was responsible As its name implies it was intended for Bengal only, and was adopted at a meeting of the Swarajists at Calcutta held on the 16th and 17th of December 1923 The agreement was put in the form of

* Muddiman Enquiry Committee Report pp 178-79

† For nine years the Mahomedans were elected to the Calcutta Corporation through separate electorates At present they have reservation of seats but no separate electorates

a resolution which was prefaced by what may be called a preamble in which it was stated that "in order to establish real foundation of self-government in this province it is necessary to bring about a pact between the Hindus and the Mahomedans of Bengal dealing with the rights of each community when the foundation of self-government is secured" It was a comprehensive resolution dividing itself as it did into four parts with minor sub-divisions Clause (*c*) of the agreement deals with the distribution of Government posts and Clause (*d*) with religious toleration, particular regard being had to the questions of cow-killing for religious purposes and music before mosque—subjects with which we are not directly concerned here But Clauses (*a*) and (*b*) are important for our purpose The former provides that "representation in the Bengal Legislative Council be on the population basis with separate electorates, subject to such adjustments as may be necessary, by the All-India Hindu-Muslim Pact and by the Khilafat and the Congress" The latter clause urges that "representation to local bodies to be in the proportion of sixty to forty in every district—sixty to the community which is in a majority, and forty to the minority Thus in a district where the Mahomedans are in the majority they will get sixty per cent Similarly, where the Hindus are in the majority they are to get sixty per cent and the Mahomedans forty per cent The question as to whether there should be separate or mixed electorates is postponed for the present to ascertain the views of both the communities"*

The Pact vehemently attacked in the Hindu Press

It will be seen that Mr Das committed himself to separate electorates so far as the Bengal Council was concerned but left the question of electorates for local bodies to be decided subsequently by the two communities concerned As regards proportional representation in local bodies, it was also subject to further consideration by the Hindus and the Mahomedans The formula regarding the Bengal Council was tentative inasmuch as provision for readjustment by an All-India Hindu Moslem Pact and by the Khilafat and the Congress was definitely made The

* Mitra The Indian Quarterly Register, 1924, Vol I, pp 63 64

Bengal Pact, however, was subjected to bitter criticism in the nationalist Press and practically repudiated by the Congress

It is worth quoting from a speech of Lord Irwin on the subject of communal representation In replying to an address presented to him by Mussalmans at Poona in 1926, his lordship said

Lord Irwin's plea for mutual toleration and goodwill.

> The question of communal representation about which you have expressed anxiety is of great complexity This spirit (mutual toleration and good will) will be found to be a better and more lasting solvent for the present discord than any artificial methods of representation but until we can reach this state communal representation in some form is likely to be necessary and it is possible that a substantial modification of it must largely depend upon the general consent of all communities

The difficulty of disturbing the *status quo*

Perhaps the only plausible argument that has ever been adduced in favour of the division of electorates on communal basis is to be found in a speech of the late Mr Gladstone which is very often quoted He emphasised the difficulty of introducing elective principle in an Asiatic country like India, with its ancient civilisation with its institutions so peculiar with such diversities of races religions and pursuits as probably except in the case of China never were before comprehended under a single government * That view was reiterated and amplified by Mr Gladstone's follower Mr Asquith in 1909 † None of the statesmen however who have supported communal representation has been able to cite historical precedents for separate electorates except in the case of Cyprus ‡ and Bohemia whose political geography has

* Gladstone: Speech in the House of Commons 28 March 1892. (Parliamentary Debates—Commons 1892 Vol. III pp. 78-84.)

† Asquith: Speech in the House of Commons on the second reading of the India Councils Bill 1909 (Parliamentary Debates Commons 1909 Vol. III pp 529-57)

‡ Cyprus was annexed by Order in Council on Nov 5 1914 after having been administered by agreement with Turkey from 1878 right up to 1914. In 1914 when the War broke out the Island had a partly elected Legislative Council with an elected majority The Council was composed of 9 Greek elected members 3 Moslem elected members and 6 British nominated members and the Governor Greek representation was subsequently raised to 12 members and that of the nominated British block to 9 while the

since been altered All of them, on the contrary, are apologetic in their insistence on the introduction or retention, as the case may be, of the system of communal representation by separate electorates in India Most of them emphasise that the *status quo* must be maintained so long as the communities for whom the special electorates were originally created do not ask for a change. The system of separate electorates had been introduced in 1909 and repeated in 1919, and the idea is that it must continue until the Mahomedans give it up of their own accord.

Communal representation unnecessary for the protection of religious and linguistic rights

Assuming that the differences between the Hindus and the Mahomedans are fundamental in regard to race, language and religious observances, what is it that the latter community gain by having representation in legislative bodies on a communal basis? Presumably the answer from the Muslim point of view would be that under such a system their religious, cultural and linguistic rights are likely to be better and more effectively protected than under any other This answer, however, loses much of its force when one refers to the Royal Proclamations and provisions in statutes guaranteeing to every community the freedom of conscience and worship Let us quote one or two instances In assuming direct charge of the Government of India in 1858 Queen Victoria made a solemn promise in the following words

> "Firmly relying ourselves on the truth of Christianity and acknowledging with gratitude the solace of religion, we disclaim alike the right and the desire to impose our convictions on any of our subjects We declare it to be our Royal will and pleasure that none be in anywise favoured, none molested or disquieted by reason of their religious faith or observances, but that all shall alike enjoy the equal and impartial protection of the law, and we do strictly charge and enjoin on all those who may be in authority under us, that they abstain from all interference with the religious belief or worship of any of our subjects, on pain of our highest displeasure

status quo was maintained in respect of Moslem representation—a post-War gesture to the Greek community The Council was, however, abolished in 1931 (Letters Patent, November 12, 1931), the Colony thus reverting to the status of government without representation

And it is our further will that so far as may be our subjects of whatever race or creed be freely and impartially admitted to offices in our services the duties of which they may be qualified by their education ability and integrity duly to discharge

The Queen s promise, as is well known, was reaffirmed and reiterated by her son, Edward VII, by a proclamation on the 2nd November 1908 and again by her grandson King George V at the Coronation Durbar in December, 1911

Religious safeguards contained in the Charter Act.

Long before the Royal Proclamations discrimination in treatment based on religion had been ruled out and strictly prohibited in the Charter Act of 1833 in which we find the assurance that no native of India nor any natural born subject of the King resident in India shall by reason only of his religion, place of birth, descent colour or any of them be disabled from holding any place, office or employment * under the East India Company Again in the Court of Directors Despatch of 1834 it was laid down that the maxim still remain that justice is to be distributed to men of every race creed and colour according to its essence † and that there can be no equality of protection where justice is not equally and on equal terms accessible to all ‡

A comprehensive charter of Fundamental Rights may prove effective

So far therefore, as the protection of religious rites is concerned, a comprehensive charter of fundamental rights with pains and penalties for offences as indicated in the preceding chapter and provided in the post-War constitutions in Europe together with the Royal Proclamations may be deemed sufficient for the purpose in view To all these may be added by way of a statutory provision the modern constitutional device of referendum in the case of Bills involving religious questions by which the community concerned should be enabled to signify their approval or disapproval as the case may be of any such Bills It may be said that referendum introduces enormous complications in a vast country like India, but the reply is that these

* 3 & 4 Will IV c. 85 Sec. 87
† Court of Directors Despatch Clause 61
‡ Ibid Clause 60

complications are more imaginary than real inasmuch as modern legislation is concerned more with economic and industrial problems than with those relating to religion so that Bills contemplated here are likely to be very small in number thereby putting them practically outside the range of practical politics It may further be provided by way of protection that no legislation affecting the religious rites of a community should be enacted except by an absolute majority in the legislature

Political and economic issues override religious questions in modern States

The next argument advanced in favour of communal representation is that the ends of democracy are not adequately met unless, as Mill said, different political groups or parties had representation in the legislatures proportionate to their number Mill's opinion may have been a sound view from the standpoint of democracy as it existed during his time, but it ought to be interpreted at the present moment in the light of modern tendencies in legislation and marked changes in the ideas of men The present tendency is towards the secularisation of the State, and to seek to divide it into religious or communal groups is to attack its foundations Mill again never contemplated religious parties in his scheme Parties always grow and develop with the growth and development of democracy, but they must have political and economic ends in view so that Hindus and Mahomedans may combine on political and economic issues to fight another group of Hindus and Mahomedans who happen to differ from them The clash of interests may be political and economic and should in no case be based on religion provided the elementary rights in regard to religion have been properly safeguarded in the constitution It is an encouraging sign that in the Indian legislatures Hindus and Mahomedans are on occasion found working together on political, economic and constitutional issues regardless of any communal considerations that may be involved With greater experience of public affairs and in an atmosphere of certainty Indian leaders and legislators may be expected to subordinate communal issues to the larger interests of the country The present conflict which is undeniably of a grave and serious nature is largely due to unsettlement, to a passing phase of political instability, to the

general ignorance of the masses and, above all, to the spirit of bargaining which has been set in motion If during the War Indian Mussalman soldiers could loyally fight against their co-religionists in the Dardanelles, Palestine and Mesopotamia in response to the Empire s stirring appeal in the cause of national self determination and rights of man, would it not be foolish to listen to counsels of despair?

Arguments against separate electorates

Separate electorates are condemned because, in the first place, they retard the growth of nationalism and of the concept of a common citizenship In the second place they restrict to a considerable extent the right of the voters to choose their own nominees to represent them in the legislatures If for example the electoral area is divided into a separate Hindu constituency and a separate Mahomedan constituency as has been done a Mahomedan elector cannot vote for a Hindu candidate even if that candidate rather than a Mahomedan happens to inspire his confidence The same restriction applies to a Hindu voter The result is that members of the legislature elected by a particular group of voters statutorily separated from any other group or groups are inclined to feel that they owe no responsibility to any group or groups save the one which has returned them to the legislature It divides the legislature into water tight compartments and renders the formulation of a national policy almost impossible In the third place under separate electorates the minority encouraged as it is to settle down into a feeling of satisfied security get an opportunity to avoid the risks and shirk the responsibilities of democracy These arguments require no stressing, for they are self evident To say that Hinduism is a house divided against itself may constitute a reasonable and fair indictment of Hindu society but it is no valid ground for the proposition that the principles of democracy should and could be vindicated and upheld by electoral divisions in the ranks of the people One blunder cannot justify another, nor can two blunders put together set things right There is therefore no answer to the argument that in the interests of national democracy electoral areas should not be divided according to religious creed There can be no compromise between

nationalism and divided citizenship because they are contradictory From his place in the House of Commons Mr Ramsay MacDonald observed in January, 1931 "If every constituency is to be ear-marked, as to community or interest, there will be no room left for the growth of what we consider to be purely political organisation which would comprehend all the communities, all creeds, all conditions of faith . If India is going to develop a robust political life, there must be room for national political parties based upon conceptions of India's interests and not upon the conceptions regarding the well-being of any field that is smaller or less comprehensive than the whole of India "*

The system of joint electorates with reservation of seats and Mr Muhammad Ali's scheme

Apart from communal representation by separate electorates, there are various other proposals which have been put forward by public men and public bodies Of these the most important are (1) the system of joint electorates with reservation of seats as recommended in the Nehru Report and later embodied in the Congress formula for the settlement of the communal problem and (2) the scheme formulated in London by the late Mr Muhammad Ali Now the Muslim objection to joint electorates applies almost with equal force to joint electorates with reservation of seats It is interesting to quote from Lord Morley who said †

> " the Mahomedans protested that the Hindus would elect a pro-Hindu upon it just as I suppose in a mixed college of say 75 Catholics and 25 Protestants voting together the Protestants might suspect that the Catholics voting for the Protestant would choose what is called a Romanising Protestant and as little of a Protestant as they could find Suppose the other way In Ireland there is an expression a 'Shoneen Catholic'—that is to say, a Catholic who, though a Catholic, is too friendly with English Conservatism and other influences which the nationalists dislike And it might be said, if there were 75 Protestants against 25 Catholics, that the Protestants when giving a vote in the way of Catholic representation would return Shoneens "

* Parliamentary Debates Commons, 1930 31, Vol 247, pp 637-48, 712
† Keith Speeches and Documents on Indian Policy, Vol II, p 92

Arguments against reservation of seats

The difficulty or anomaly, as emphasised by Lord Morley is not got rid of by providing only reservation of seats for Mahomedans By this device a fixed statutory number of Mahomedans will no doubt come to the legislature, but assuming that the religious differences between Hindus and Mahomedans are acute and feelings between them bitter such Mahomedans as do not sympathise with the Hindus directly or indirectly would not have the ghost of a chance of being returned by a constituency having on its electoral roll a majority of Hindus In such a case, Mahomedans might reasonably complain that reservation of seats is no adequate safeguard against the Hindu majority The strongest argument however in favour of this scheme is that only nationalist Hindus and nationalist Mahomedans as against rank communalists would have the best chance of capturing the seats in the legislature

The Muslim demand for a statutory majority in Bengal and the Punjab anti national and anti democratic.

In this connection the demand made by a certain section of the Punjab and Bengal Mahomedans for the statutory majority in their respective legislatures and the general Moslem demand for weightage in the provinces where they are in a minority deserve some notice The Muslim case in Bengal and in the Punjab raises an entirely different issue from that involved in the problem of minorities protection The Mahomedans point out that on account of their inferior position in respect of wealth education and political experience they are not able to compete with the Hindus on terms of equality and hence they insist on a statutory majority in the legislature Apart from its essential incongruity and unreasonableness, the proposal if accepted and given effect to would put a particular communal group in a permanent majority in the legislature thereby rendering responsible government into a veritable farce and reducing democracy to a nullity Democracy has its risks and responsibilities and one of the risks is the uncertainty of the political barometer in the constituencies Assured by statute of a majority the Mahomedans will form a Government unassailable by political influences and irresponsive to a considerable mass of public opinion The same argument holds good

in the case of those provinces where the statute gives the Hindus a majority

The idea is grotesque and more so when one finds the Mahomedans insisting on weightage in provinces where they are in a minority on grounds of their historical past, their general contribution to the stability of administration and their stake in the country These two demands, namely, a statutory majority where they are in a majority and weightage everywhere else, taken together, illustrate that interesting maxim of the toss " Heads I win, tails you lose "—a maxim which is not "cricket" and not acceptable in a sound political system Then weightage carried to its logical conclusion is not a practical proposition If the Mahomedans are entitled to weighted representation, so are the other minorities; and when every minority group gets such representation, the majority is reduced to a minority and is, therefore, deprived of its legitimate voice in the control of affairs—a state of things which is as unreasonable as it is unfair and unjust Let us once more quote Mr Ramsay MacDonald who spoke as follows in the House of Commons in January, 1931

The principle of weightage attacked by Mr MacDonald

> " It is very difficult again to convince these very dear delightful people that if you give one community weightage, you cannot create weightage out of nothing You have to take it from somebody else When they discover that, they become confused indeed and find that they are up against the brick wall "*

As regards the late Moulana Muhammad Ali's scheme which is one of joint electorates hedged in by certain conditions, the distinguished author himself confessed that a generation ago he had been one of the protagonists and upholders of separate electorates but admitted at the same time that such a scheme was now out of date The Moulana made it clear that " We should now have, in the interests of Indian nationalism, a mixed territorial electorate " The conditions attaching to his scheme are (1) that the seats in the legisla-

The points in Mr Muhammad Ali's scheme

* Parliamentary Debates Commons, 1930 31, Vol 247

ture should be reserved for both the communities—Hindus and Mahomedans, (2) that no candidate should be declared elected unless he secured (*a*) at least forty per cent of the votes cast of his own community and (*b*) at least 5 per cent of the votes cast of other communities wherever he is in a minority of ten or less per cent and ten per cent where he is in a larger minority or in a majority

The Moulana expected that his scheme would serve three purposes First he said every candidate will have to go cap in hand to both the communities Secondly no man would be returned to represent any community who did not represent at least a fair percentage of that community, though not necessarily a majority as under separate electorates Thirdly, no person who is not in the least a *persona grata* to a sister community would be able to secure election even if he is favoured by his own community

Arguments for the scheme

There are certain difficulties involved in the plan The objections to reservation of seats apply in this case also The Moulana himself observed that this will only be the relic of the present separate electorate which is unfortunately inevitable to-day because in the event of no candidate from a constituency satisfying the conditions laid down in the scheme the Moulana s recommendation is that the candidate who secures the largest number of votes cast of the community for whom the seat is reserved must be declared elected Another formidable point against it is that it would be difficult to ascertain which community records what number of votes and for which particular candidate so long as voting is carried on in the ballot box secrecy which cannot be dispensed with without prejudicially affecting the voting procedure The Returning Officer might give returns detailing every kind of information required for the purpose but that would cause inevitable delay in the announcement of results and involve additional expenditure and expose the whole system to gross abuses

It is necessary in this connection to examine in some detail the communal decision of the British Government announced simultaneously in London and Simla on the 16th of

The scope of the communal decision

August, 1932, and subsequently reaffirmed in the White Paper and in the Report of the Joint Parliamentary Committee and incorporated in the Government of India Act, 1935 The scope of the decision was originally confined to the provisions for minorities representation in the Provincial legislatures, the consideration of representation in the Central legislature having been deferred then The White Paper filled up the gaps and both the Joint Parliamentary Committee's Report and the Government of India Act, 1935, have generally followed the White Paper It has accepted the principle of communal representation through separate electorates which the Morley-Minto Reforms of 1909 introduced for the first time into the Indian constitution. It has also accepted the principles of reservation and weightage In the matter of multiplication of electoral compartments it has definitely and distinctly exceeded the range and scope of the Mont-Ford scheme of 1919, for while according to the latter the number of interests which were sought to be protected by separate electorates was about 10, the number under the new plan has been raised to 18 The interests for which provisions have been made in this regard are described as follows · General male, General female, Moslem male, Moslem female, Europeans, Anglo-Indian male, Anglo-Indian female, Indian Christians male, Indian Christians female, Sikhs male, Sikhs female, Landholders, Depressed Classes, Labour, Universities, Commerce-Industry-Mining-Planting (European), Commerce-Industry-Mining-Planting (Indian) and backward areas Of course the number varies slightly from province to province

The Federal Upper House

The Upper Chamber or the Council of State of the Federal legislature will consist of 156 representatives of British India and not more than 104 representatives of the Indian States as set out in the Table of Seats in the First Schedule to the Act of 1935 * Of the total British India seats of 156, six seats shall be filled up by persons chosen by the Governor-General "in his discretion "† Of the remaining 150 seats 75 will go to "General," 6 to scheduled

* Sec 18(2)

† First Schedule, Part I, clause 3

castes, 4 to Sikhs, 49 to Mahomedans, 6 to women, 6 to Anglo-Indians, 7 to Europeans and 2 to Indian Christians * In certain constituencies the election will be direct and in others indirect and the Council shall be a permanent body not subject to dissolution and about one third of the members shall retire in every third year in accordance with the provisions made in that behalf contained in the First Schedule † No person shall be entitled to vote at an election to fill a Sikh seat or a Mahomedan seat unless he is a Sikh or a Mahomedan as the case may be ‡ No person who is, or entitled to be included in the electoral roll for a territorial constituency in any province for the election of persons to fill a Sikh seat or a

A European means a person whose father or any of whose other male progenitors in the male line is or was of European descent and who is not a native of India An Anglo-Indian means a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is a native of India European descent appears to have come into vogue in law since 1919 as representing what is popularly known as the European race A native of India is defined in Section 6 of the India Act of 1870 (33 Vict. c 3) It includes any person born and domiciled within the Dominions of His Majesty in India or Burma of parents habitually resident in India or Burma and not established for temporary purposes only It appears therefore that there is no difference in terms of the new India Act between a European and an Anglo-Indian save in regard to nativity as contemplated in the Act of 1870 An Indian Christian means a person who professes any form of the Christian religion and is not a European or an Anglo-Indian The scheduled castes means such castes races or tribes or parts of or groups within castes races or tribes being castes races tribes parts or groups which appear to His Majesty in Council to correspond to the classes of persons formerly known as the depressed classes as His Majesty in Council may specify The groups castes tribes etc included in the scheduled castes have been set out and specified in the Government of India (Scheduled Castes) Order 1936 These definitions in Clause 26 of the First Schedule are for the purposes of the Act only and do not govern other Indian Acts. The procedure of trial of European British subjects for example is to be governed by the Cr P C Under Sec 4(1) of the Code a European British subject means (a) any subject of His Majesty of European descent in the male line born naturalised or domiciled in the British Islands or any Colony or (b) any subject of His Majesty who is the child of any such person by legitimate descent It follows that the definition in the Code covers both Europeans and Anglo-Indians Nor are all Europeans eligible for election to the legislatures unless they are British subjects (First Schedule Part I clause 1) Besides Europeans other than British subjects of either description (natural born or naturalised) cannot be included in the electoral roll for any constituency either territorial or special. (Sixth Schedule Part I clause 3 The Provincial Legislative Assemblies Order Part I clause 5 The Provincial Councils Order Part I clause 6) Concessions are however made under the Act in this regard to the Ruler or subject of a Federated State or of any other State in respect of which special provision may be made

‡ Section 18(4) of the 1935 Act

* First Schedule Part I Clause 6(1)

Mahomedan seat shall be entitled to vote at an election to fill a general seat allotted to that province.* No Anglo-Indian, European or Indian Christian shall be entitled to vote for a general seat † Those three clauses read together make the electoral division complete

The Federal Lower House

The Lower House of the Federal legislature, *viz*, the House of Assembly, shall consist of 250 representatives of British India and not more than 125 representatives of Indian States in accordance with the provisions contained in the First Schedule The Assembly, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer, and the expiration of the said period of five years shall operate as its dissolution ‡ The extension of its life either by its own legislation or by the Governor-General is therefore not contemplated Of 250 British India seats, 105 have been reserved for General which includes Hindus, Parsis, Jains and Buddhists all others who are not included in any specified territorial constituency, 82 for Moslems, 8 for Europeans, 8 for Indian Christians, 4 for Anglo-Indians, 6 for Sikhs, 11 for Commerce and Industry, 7 for Landholders, 10 for Labour and 9 for Women Of 105 "General" seats, 19 will go to the scheduled castes, thus leaving the upper caste Hindus with only 86 seats in a House of 250 British Indian members § It is clear that weightage has been provided in the Central Legislature for Moslems and Europeans and that the upper caste Hindus have been denied the full share of representation to which their numerical strength entitles them Persons to fill the seats in the Assembly allotted to a Governor's Province as General seats, Sikh seats or Mahomedan seats shall be chosen by electorates consisting of such of the members of the Legislative Assembly of the Province as hold therein general seats, Sikh seats or Mahomedan seats respectively, voting in the case of a *general election**

* *Ibid*, 6(2)

† *Ibid*, 6(3)

‡ Sec 18 (5) of the 1935 Act

§ First Schedule, Table of Seats, The Federal Assembly, Representatives of British India

in accordance with the principle of proportional representation by means of the single transferable vote In the North West Frontier Province, however, the holders of Sikh seats and in any Province in which seats are reserved for representatives of backward areas or backward tribes, the holders of those seats shall be deemed to occupy general seats It means in other words that three Sikh representatives in the North West Frontier Province, one representative of the backward areas or tribes in Madras one such in Bombay, seven such in Bihar one such in the Central Provinces and Berar nine such in Assam and five such in Orissa will form part of their respective General Provincial Assembly Constituencies for the purpose of electing representatives to the Federal Assembly Nineteen seats reserved for the scheduled castes shall be filled by persons elected from amongst representatives chosen in accordance with the procedure set out in Clause 20 of the First Schedule to the Act The primary electorate entitled to take part in a primary election held for the purpose of electing the panel for each seat reserved for the scheduled castes in the Federal Assembly shall consist of the successful candidates at the primary elections for Provincial Assemblies held in accordance with the provisions of the Fifth Schedule to the Act It is however open to all holders of the general seats in the Provincial Assemblies to take part in the election to fill up all general seats including seats reserved for the scheduled castes The electoral College procedure shall be adopted for filling up seats reserved for Europeans Anglo-Indians and Indian Christians and is specified in Clause 22 of the First Schedule

The legislature in Bengal.

More important from the point of view of communal representation is the provision made in the Act for Provincial legislatures Let us for the purposes of illustration take up Bengal as she affords a rather novel case of minorities protection We do not deal with other provinces because generally in those places with the exception of the Punjab the North West Frontier Province and the newly created Mahomedan Province of Sind the communal

A general election herein contemplated does not mean an election in a general constituency but general election in the sense that it is not a bye-election

decision of His Majesty's Government has not given rise to any bitter controversy The Bengal Provincial legislature shall consist of two Chambers * The Upper House called the Legislative Council shall like its Federal counterpart be a permanent body not subject to dissolution, and about one-third of its members shall retire in every third year under the Fifth Schedule † It shall consist of not more than 65 and not less than 63 members of whom 10 will come from the "General" constituencies, 17 from Mahomedans, 3 from the European community, 27 to be elected by members of the Provincial Legislative Assembly and not more than 8 and not less than 6 will be nominated by the Governor "in his discretion" No person shall be included in the electoral roll for a Mahomedan constituency or a European constituency unless he is a Mahomedan or a European, as the case may be Similarly, no person who is, or is entitled to be, included in the electoral roll of any of those constituencies shall be included in the electoral roll for a general constituency No person is entitled to offer himself for election in a territorial constituency unless he is entitled to vote in that constituency or in any constituency of the same communal description A person shall not be qualified to hold a seat to be filled by members of the Legislative Assembly unless he has the requisite qualifications of a Council voter and is entitled to vote At an election in a territorial constituency where more than one seat is to be filled, a voter shall have as many votes as there are seats to be filled and may give all those votes to any one candidate or may distribute them between such candidates In the European constituency, however, a voter shall not give more than one vote to any one candidate The twenty-seven seats specified in the seventh column of the Table of Seats and referred to above shall be filled up by persons elected by the members of the Provincial Legislative Assembly in accordance with the system of proportional representation by means of the single transferable vote ‡ It is thus clear that one

* In addition to Bengal, Madras, Bombay, the United Provinces, Bihar and Assam, will each have a bicameral legislature (S 60 of the 1935 Act)

† Sec 61 (3)

‡ Fifth Schedule, Clause 14 (c)

has been taken in the Act to enable the minority, if they so desire to maintain the communal balance sought to be effected in the Lower House * But members are free to act subject to the special method of voting as provided in the relevant Schedule and no communal voting is mandatory under the Act In this view Rule 84 of the Bengal Council Electoral Rules, 1936 made by the Governor in Council under paragraph 20 of the Fifth Schedule read with paragraph 23 of Part I of the Provincial Councils Order as regards casual vacancies, seems to be *ultra vires* and beyond jurisdiction inasmuch as it seeks to make communal election obligatory The Governor in Council was not competent to impose a restriction on the members of the Assembly in respect of their choice which is not contemplated in the Act The Act and Orders may be supplemented but not supplanted by rules made by a subordinate authority unless specifically empowered in that behalf It is to be noted in this connection that provisions for indirect election of certain members to the Upper House by the Assembly have been made only in the case of Bengal and Bihar

Coming to the Lower House *viz* the Bengal Legislative Assembly † out of 250 seats 80‡ have been reserved for General including 30 seats which according to the Poona Pact have been given to the scheduled castes 119§ for Moslems 2 for Indian Christians 4|| for Anglo-Indians and as many as 25 for Europeans including their commerce representation ¶

* *Cf* paragraph 19 of the Communal Award.

† The Table of Seats in the Fifth Schedule

‡ Of these 80 2 are reserved for General women

§ Of these 119 2 are reserved for Mahomedan women

|| Of these 4 1 is reserved for Anglo-Indian women.

¶ Eleven territorial seats for Europeans are allotted in the 9th column of the Table of Seats in the Fifth Schedule but there is no provision in the Act for the other fourteen seats in respect of commerce representation specified in the 11th column. It was laid down in Mr MacDonald's Award that of the 19 seats reserved for Commerce Industry Mining and Planting in Bengal 14 would go to Europeans. The Act provides by Section 61 (1) that the composition of a Provincial legislature shall be such a is specified in relation to the Province concerned in the Fifth Schedule In the eleventh column of the relevant schedule 19 seats are assigned without reference t any particular community To this extent therefore the provision in the Award had no binding effect in terms of the Act and it was open to Sir Laurie Hammond and his colleagues to suggest modification of the Award in that regard. Indeed at one of the Committee's sitting at Calcutta Sir Laurie is reported to have

The question for consideration in this connection is, what is the principle which has guided His Majesty's Government in allocating seats to different communities? In Bengal Moslems constitute a majority of the population and not a minority A statutory reservation of seats for a majority community on grounds of minorities protection is unprecedented in history The British Government have refused to be guided in this matter by constitutional precedents

The position of Hindus *vis a-vis* other communities

In Bengal, according to the Census Report of 1931, Moslems constitute 54 8 per cent of the total population, 51 3 per cent of the adult population, and the General which practically means Hindus constitutes 44 8 per cent of the total population and 48 3 per cent of the adult population Leaving 51 seats (25 for Europeans,* 4 for Anglo-Indians, 2 for Indian Christians and 20 reserved for special Indian interests) there are left 199 seats to be divided between Hindus and Moslems If these seats are divided in proportions of the total population (54 8 and 44 8), Moslems get 109 and Hindus 90 It is clear, therefore, that from the point of view of the total Hindu-Moslem population, Moslems have got 10 seats in excess and Hindus 10 seats less under the communal decision In the proportions of adult population of 51 2 and 48 3 respectively,

remarked that " the idea of these commerce seats is to get expert representation which really ought not to be a matter of community, race, religion or even domicile What we really want is to get best men who have expert knowledge of Commerce and Trade " This view had been earlier taken by certain members of the Provincial Delimitation Committee But finally the Hammond Committee refused to alter Mr MacDonald's distribution, and in Part VII of the Fourth Schedule to the Government of India (Provincial Legislative Assemblies) Order, 1936, 14 seats have been allotted to associations which are European and 5 seats to Indian Commerce The seats are distributed as follows 7 to Bengal Chamber of Commerce (European), 2 to Calcutta Trades Association (European) 2 to Indian Jute Mills Association (European), 2 to Indian Tea Association (European), 1 to Indian Mining Association (European), 2 to Bengal National Chamber of Commerce (Indian), 1 to Indian Chamber of Commerce (Indian), 1 to Marwari Association (Indian), 1 to Moslem Chamber of Commerce (Indian) The Bengal Mahajan Sabha has, without sufficient cause, been deprived of the representation which was accorded to it under the Government of India Act Having regard to the need for expansion and development of Indian industries and the weighted representation extended to the European community in the territorial constituencies the distribution made in the Order seems to be unfair to the Indian business community

* *Cf* the preceding footnote regarding " Commerce " seats

Moslems should get about 103 seats and Hindus 96 seats Viewed from the standpoint of Hindus and Moslems only without refer ence to any other community, 16 too many seats have been allo cated to Moslems and Hindus have been given 16 seats less than their due share of representation It must not, however be understood that justice has been done to the Moslem community in respect of their representation on the basis of population What is meant is that greater injustice has been done to Hindus than to Moslems This aspect of the problem was discussed threadbare by Sir Nripendra nath Sircar and brought out in bold relief in his searching cross examination of Sir Samuel Hoare before the Joint Parliamentary Committee It ought to be added that the Secretary of State admitted the accuracy of the figures put to him by Sir Nripendra nath It is also clear that Anglo Indians have got 1 6 per cent of the seats in the Legislative Assembly as against 1 per cent of the population Indian Christians 8 per cent of the seats as against 3 of the population and Europeans 10 per cent of the seats (including their commerce representation) as against only 1 per cent of the population It follows that the allocation of the General seats has not at all been made on the population basis It is moreover significant that if Moslems can secure in addition to their reserved seats 7 seats out of 20 seats* allotted to Labour Indian Commerce Landholders and Universities they will occupy for all practical purposes a statutory majority in the Assembly † That such a situation will seriously affect the founda tions of responsible democracy as enshrined in the Act admits

* In the first general elections Mahomedans secured only 4 such seats so that at present they number 123 in an Assembly of 250

† While reluctantly conceding in existing circumstances in India the necessity for separate electorates the Marquess of Zetland makes no hesitation in attacking the distri bution of seats as outlined in the White Paper and subsequently incorpo rated in the Act But it is one thing the Secretary of State (then not in office) writes to concede separate communal electorates for the pur pose of giving minorities reasonable representation in the various legislatures it is an entirely different thing to employ the system for the purpose of conferring upon a majority community in any particular province a permanent majority in the legislature unalterable by any appeal to the electorate. Such a course has never hitherto been adopted.

Thus is the position which will arise if the distribution of seats proposed in the White Paper for the Legislative Assembly of Bengal is given effect to (J P C Report Vol I Part II Proceedings p 393)

of little doubt As Professor Laski observes, "Responsible Government in a democracy lives in the shadow of coming defeat, and this makes it eager to satisfy those with whose destinies it is charged"

The effect of weightage

It may be said that for the purpose of giving fair and effective representation to certain minorities, weightage has got to be provided for them It will be seen that Moslems, wherever they are in a minority, have been guaranteed their present large weightage under Mr MacDonald's award In Madras, for example, they have got more than 13 per cent of the seats as against 7 1 per cent of the population, in the United Provinces more than 27 per cent fot the seats as against 14 8 per cent of the population and in Behar and Orissa taken together their allotted ratio of representation is more than double their population ratio We admit that once the principle of communal representation is accepted, there can be no objection to some kind of weightage for minorities But what about the Hindus? They have not only got no weightage in Bengal and the Punjab where they are in a minority, but the number of seats allotted to them is much smaller in proportion to their numerical strength Further, for the purpose of giving weightage to Europeans, Indian Christians and Anglo-Indians, seats have been taken from Mahomedans where they are in a majority and also in certain cases from the Hindu minority (*e g*, Bengal and the Punjab)

Weightage may be guaranteed to a community on account of its backwardness and economic inefficiency According to such principle, Europeans are not entitled to it It may be given, on the other hand, to a community on account of their services to the State, their large stake in the country and their contributions to the public exchequer From this point of view Hindus in Bengal as well as Europeans can legitimately claim weightage Both these principles have, however, been accepted in the award wherever possible and whenever necessary but always and consistently to the prejudice of the Hindus *

* The Marquess of Zetland thinks that "when the relative position of the two communities (Hindus and Musalmans) in Bengal in everything except actual numbers is

The Poona Pact and its implications

Now, much has been said and written about the Poona Pact This Pact was signed on the 25th of September, 1932 On the 26th of September, the Home Member announced in the Legislative Assembly its acceptance by His Majesty s Government It has replaced separate electorates for the scheduled castes by joint electorates with reservation of seats and has substituted 30 seats for the original 10 seats in Bengal with power to contest additional seats in the general constituencies The procedure is that there will be primary elections under which the depressed classes voters will elect a panel of four members for each reserved seat for election by general constituencies to the legislature The relevant clause in the Pact reads as follows

> Election to these seats shall be by joint electorate subject however to the following procedure All the members of the depressed classes registered in the general electoral roll of a constituency will form an electoral College which will elect a panel of four candidates belonging to the depressed classes for each of such reserved seats by the method of the single vote and the four persons getting the highest number of votes in such primary election shall be the candidates for election by the general electorate

This panel of the so-called four primary candidates for a reserved seat has given rise to much controversy between different sections of Hindu opinion * It must be admitted that the impli

taken into account the reasons against placing the Hindu community in a position of permanent statutory inferiority in the legislature are particularly strong Under British Rule the present Secretary of State (then not in office) proceeds to point out the Hindus have pl yed an enormously predominant part in the intellectual the cultural the political the professional and the commercial life of the province More than 64 per cent of those who are literate in Bengal are Hindus nearly 80 per cent. of the students attending High Schools nearly 83 per cent. of those in Degree Classes and nearly 86 per cent of the Post-Graduate and research students are Hindus. A similar preponderance is found n the case of the professions and in the case of Banking Insurance and Exchange In all previous constitutions the significance of these facts has been dm tted Under the Lucknow Pact (an agreement between Moslems and Hindus arrived at in 1916) the Moslems in Bengal were allotted no more than 40 per cent of the seats proposed to be filled by Indians by election (J P C Report Vol 1 Part II Proceedings p 340)

* Indian Delimitation Committee Report Vol. III pp 47 49

cations of the procedure could not be carefully examined by the draftsmen in the extraordinary circumstances in which the formula was evolved It has been contended by certain caste Hindus that the Pact was a concession to the Harijans and was made on certain conditions the non-fulfilment of which rendered the election void According to them, the panel of four is a minimum, for otherwise the panel might be reduced to a number just equivalent to the number of reserved seats thereby giving the general electorate absolutely no choice in the election of the scheduled castes members to the Assembly and perpetuating in effect the MacDonald division of the Hindu community into separate electorates which it was Mr Gandhi's intention to prevent They urge that if the four candidates are not forthcoming, the primary election should be postponed and an effort made to obttain the requisite number, a procedure which is likely to cause great electoral inconvenience and produce deadlocks On the other hand, Dr Ambedkar, a part author of the Pact, says that four is the maximum, " meaning not more than four," it does not mean " not less than four."

The panel and the "optimum" theory

In trying to hold the scales even the Hammond Committee have been led to assert that " the number of four is neither a maximum nor a minimum, but an optimum " It is desirable," they add, " that there should be five or more candidates at the primary election, but it is in no wise compulsory "* The Committee's verdict legally was in Dr Ambedkar's favour, but as a counsel of perfection, if we may say so, in favour of the caste Hindu view By Clause 14(1), Part I, of the Government of India (Provincial Assemblies) Order, 1936, doubt as regards the issue has been removed A primary election may be proceeded with notwithstanding that less than four candidates stand at that election Again the remainder of the election may be proceeded with notwithstanding that, by reason of a deficiency of candidates at the primary election or by reason of the withdrawal or death of candidates elected already at the " primary," there are or remain less

* *Ibid*, Vol I, p 105

than four duly elected scheduled caste candidates for a reserved seat It is extremely doubtful if this provision fulfils the purpose of the Pact especially in view of the large increase in the reserved seats for the scheduled castes as compared to the provision made in the MacDonald Award In practice, however, in areas where as in certain Bengal districts scheduled castes are concentrated it is expected that there will be no dearth of primary candidates

Except in Bengal a member of the scheduled castes shall not be disqualified from holding a general seat (not reserved) by reason of the fact that he has not passed successfully through a primary * In Bengal in a constituency in which a seat is reserved for the scheduled castes any such member is required to come through a primary provided that no such disqualification shall apply in respect of a bye-election at which no reserved seat is to be filled † Special circumstances in Bengal where there are compact areas of scheduled castes seem to have prompted this special provision

Now where at an election a poll is taken for the purpose of filling more than one seat a voter shall have as many votes as there are seats to be filled on the poll and may give all the votes to one candidate or distribute his votes among the candidates ‡ In the mixed general constituencies this provision may prove in practice a safeguard for the caste Hindu minority in a particular constituency but the fact cannot be ignored that it may also tend to cause divisions in the electoral areas on grounds of caste It should be noted that cumulative voting is ruled out in the primaries At a primary election no voter shall have more than one vote§ whatever the size of the panel

The questions involved in the acceptance of the Poona Pact by His Majesty s Government are (1) whether the Pact satisfies the conditions laid down in paragraph 4 of Mr MacDonald s award in which His Majesty s Government held out the assurance

Clause 11 (3) Part I of the Provincial Assemblies Order

† *Ib d* Clause 2 Part IV In a constituency in which no seat is reserved nothing definite is stated in the Order but it is clear that a scheduled castes member may contest a seat without any primary

‡ *Ibid* Clause 15 Part I.

§ *Ibid* Clause 14 (2)

that if the communities affected were agreed upon a practical alternative scheme either in respect of any one or more of the Governors' Provinces or in respect of the whole of British India, then the Government "would be prepared to recommend to Parliament that the alternative should be substituted for provisions now outlined," and (2) whether the numerical strength of the depressed classes justifies allotment to them of 30 seats out of 80 general seats.*

It is well-known that throughout the proceedings of the Joint Parliamentary Committee Sir Nripendranath Sircar played the role of a doughty champion of the rights of the caste Hindus as against the depressed classes. His contention was that Bengal was not represented in the Poona Conference, that there was not a single Bengalee Hindu signatory to the Pact and that at the earliest opportunity representative Hindus from Bengal had expressed their disapproval of the terms of the Pact in so far as they affected their province and communicated it to His Majesty's Government. Reference was made in that connection to a telegram sent in December, 1932, to the Prime Minister by 25 members of the Bengal Legislative Council. We confess we are not impressed by Sir Nripendranath Sircar's contention. The Poona negotiations were in progress for days together and as soon as the Pact was signed representations were made to the Prime Minister, as Sir Samuel Hoare pointed out in reply to Sir Nripendranath's cross-examination, requesting him to accept the Pact and announce his decision immediately, including a telegram from such a representative man as Dr. Rabindranath Tagore. Sir Samuel Hoare was perfectly right when he said that protests had first begun to be made to His Majesty's Government something like three months after the acceptance of the Poona Pact. It is no use reminding the Secretary of State or the British Government that Dr. Tagore

* In some constituencies where seats are reserved for scheduled castes it is just likely that they would be able to capture some additional seats, and in the last general elections a scheduled castes candidate captured a general seat (no reserved) in a Backergunje district constituency defeating a caste Hindu. In certain districts in Bengal they are not only large in numbers but represent a compact group. There the upper caste Hindus will have little chance of winning at the polls. Under the India Act (now repealed) which made provision for such reservation the depressed classes succeeded in securing representation in the Council by defeating upper caste Hindu candidates.

is a Brahmo and not a Hindu So far as representation in the legislature is concerned, Brahmos do not form a distinct class from the Hindus and if in this matter Dr Tagore cannot be considered a Hindu, it is difficult to say who in Bengal satisfies the test Sir Nripendranath s argument therefore is untenable But it is to be noted that Dr Tagore himself wired in July 1933 to the Prime Minister expressing his disapproval of the Pact and seeking to explain the considerations which in September 1932 had misled him into appealing to the Prime Minister to accept the Pact Frankly speaking it does not seem to be in accord with Dr Tagore s position to take up an attitude like this Apart from the fact that the Poona Pact is an all India agreement and as such required the assent of representative Hindus of the country as a whole (a test which has been satisfied in this case) it cannot be denied that invitations were extended to certain well known Hindus in Bengal and that those who were present at Poona when negotiations were going on accorded their approval to the provisions of the agreement * On the ground of Bengal s present opposition to it therefore it cannot and should not be revised unless the castes affected reach an agreed solution

Was the Pact an agreed settlement

The only consideration that may be held to have vitiated the Pact is the method by which it is believed in certain quarters to have been secured It may be recalled that the Prime Minister s decision was announced on the 17th August 1932 and that Mr Gandhi s fast unto death began on the 28th of September 1932 On the 18th of August in the course of a letter to the Prime Minister Mr Gandhi held out a threat to fast and stated This fast will cease if the British Government on their own motion or under pressure of public opinion revise their decision and withdraw their scheme of communal electorates for the de-

Element of coercion in Mahatma s fast

* The Marquess of Zetland and his supporters in the Joint Parliamentary Committee dissented from this view We do not think they remarked that those who were parties to it (the Poona Pact) can be said to have possessed any mandate to effect a settlement (J P C Report Vol I Part II Proceedings p 330) We are not however told what in the circumstances would have been the correct procedure to consult Hindu opinion on the subject.

pressed classes, whose representatives shall be elected by general electorates under common franchise" We are afraid that such a method of bringing pressure either on the Government or on the public for the solution of political questions is a crude and perhaps dangerous method But Mr Gandhi succeeded in influencing public opinion in the country in his favour by his fast with the result that the Poona Pact was agreed upon, which the Government, in accordance with paragraph 4 of their award, immediately accepted The Mahatma placed his countrymen in such a position that they had either to accept his scheme or, in the alternative, to allow him to die slowly The alternative was too horrible to think of, and naturally all opposition to his scheme was smothered A contract becomes invalid in law if it is secured under duress, and it cannot be denied that in Mahatma Gandhi's method there was a certain element of coercion It must, however, be admitted that the Poona Pact, when it was signed and published, appeared to give satisfaction generally to all sections of the people concerned It is, therefore, unfair that those who approved of it then on its merits should attack its provisions now The first question, therefore, raised in connection with the Pact should be answered in the affirmative, *i e*, it satisfies the conditions laid down in paragraph 4 of the Prime Minister's communal award

No definite criterion to determine scheduled castes

As regards the second question, the first point for consideration is, who are the depressed classes and who are not? It is interesting that these classes may be made to reach any figure between 07 millions to 11 or 12 millions depending on the nature of definition of the term The Government of Bengal had prepared a rather formidable list of scheduled castes When, however, they were asked as to the criteria which they had accepted as determining these castes, they said in effect that they had applied neither the criterion of untouchability nor that laid down by the Franchise Committee* nor any other It may be stated that after the publication of the list of scheduled castes prepared by the local Government, over three hundred peti-

* Pollution by touch or sight

tions were put in from different castes against their inclusion in the list In Part III of the Schedule to the Government of India (Scheduled Castes) Order, 1936 the number of castes specified to be scheduled is 76, the principal among them being Namasudras, Rajbanshis Malos Mallahs Jalia Kaibartas, Bagdis, Mahlis, Bhuimalis, Chamars, Nats, Santals, Mehtars Muchis, Doms, Kochs, Patnis, Pods, Garos Dhenuars and Dhobas In Bengal, as a matter of fact untouchability of an acute form such as is met with in Madras or in some other provinces does not exist It is true that there is no inter-dining or inter marriage between the lower castes and the upper class Hindus But this exclusiveness is observed among the upper classes themselves as also among the so-called depressed classes A Brahmin for example does not dine socially with a Vaidya or a Kayastha, representing as they do two very cultured and progressive castes in Bengal Similarly a Namasudra does not dine with a Rajbanshi or a *dhobi* all these castes falling under the category of the so-called depressed classes If there is suspicion of the upper caste tyranny or domination on the part of the Namasudras under the new Act the same suspicion is there between one caste of the depressed classes and another Namasudras and Rajbanshis in Bengal have by their numerical strength their economic efficiency and their rapid progress in education and different spheres of activity, come to occupy a position which cannot be compared with that of the other scheduled castes They have made their influence felt to such an extent that in constituencies under the Government of India Act their candidates were found sometimes to have defeated at the polls their upper caste rivals for legislative honours So it comes to this that the 30 seats reserved for the so-called scheduled castes would in the majority of cases go to Namasudras or Rajbanshis who differ from the other depressed class castes no less than the upper caste Hindus differ from them * The Poona Pact will thus have the effect of robbing Peter to pay Paul

* It is interesting to note that the same view has been taken by the Marquess of Zetland the Secretary of State for India whose knowledge of affairs in Bengal is beyond challenge In his opinion the result of extending the list of scheduled castes as

How the tide turns

Besides, applying the criteria laid down by the Lothian Committee or any modified formula for ascertaining depressed classes, it is difficult to make up three or four millions for them. In Bengal for the territorial constituencies 199 seats have been given to a population of 50 millions which works out at 4 seats for every million and consequently under the Poona Pact the depressed classes have got almost double the seats to which their numerical strength entitles them. It is well-known that the expression 'Depressed Classes' has however attained, as Mr Thompson pointed out in his Census Report, a political significance enhanced recently by provision for their special representation in the legislature. It is significant to note that so long as this provision was not made many of the more advanced among the backward classes were trying to raise their status by changing the nomenclature of their castes. Thus the Chandals became Namasudras and wanted to be Brahmins. Many including the Rajbanshis became Khatriyas and so on. "The tide began to turn," observes Mr Thompson, "as soon as it was fully realised that there were to be substantial special privileges for the depressed classes. Those who were trying to rise up hastily commenced climbing down."

We think that, in the first place, the numerical strength of the depressed classes as ascertained by the tests laid down by the Lothian Committee does not justify the allocation of 30 seats to them, that secondly, these 30 seats will in the existing circumstances be practically captured by Namasudras and Rajbanshis to the exclusion of the real depressed classes and that thirdly, no case has been made out for reservation of seats at least for Namasudras and Rajbanshis in Bengal.

proposed in the White Paper, will be to defeat the object in view, for it will not then be members of the real depressed classes who will be returned for the Scheduled Caste seats but members of the powerful Namasudra and Rajbansi castes who experience no difficulty in getting returned to the legislature even now without any reservation of seats at all, and whose interests are as much opposed to those of the untouchables as are the interests of the highest castes themselves" (J P C Report, Vol I, Part II, Proceedings, p 389)

Provisions for modification of the award futile.

Now it is laid down in Mr MacDonald's award that provisions will be made in the constitution itself to empower the revision of this electoral arrangement (and other similar arrangements) after ten years with the assent of the communities affected for ascertainment of which suitable means may be devised * We are afraid that this provision will always remain on paper and be inoperative for all practical purposes Once a community is given certain concessions,† it is difficult, nay, impossible to make them agree to give up those concessions On the contrary the enjoyment of them for a number of years will raise the question of *status quo* In our discussions on the scheme of separate electorates we have attempted to show that the supporters of that scheme have always relied on the argument that although on principle they are opposed to separate communal representation they could not abolish it without disturbing the *status quo* and thereby affecting adversely the position of certain minorities No other argument seems to have weighed with them So after ten years when the question of revision of the electoral arrangements may be canvassed the minorities who have benefited by the present award will apart from the merits of the award if there be any confront the revisionists and tell them that they would not allow the latter to disturb the *status quo* Separate electorates were introduced for the first time under the Morley Minto Reforms in 1909 They were not abandoned in 1919 They were not given up even by a Prime Minister who more than once had declared himself against such electoral devices Mr MacDonald has on the contrary extended the principle of separate communal representation

* Para 6 of the Award and para 49 of the Introduction to the White Paper It is to be noted that the Bengal Legislative Council in its July session (1932) passed a resolution in favour of joint electorates and accepted the principle of joint electorates with reservation of seats for Bengal Municipalities in a Bill passed in that session Besides women and Indian Christians are generally opposed to divisions of electorates on a communal basis.

† We think observe the Marquess of Zetland and his supporters in the Joint Parliamentary Committee that it is unlikely that such assent (to the modification of the Award) will be given by a community entrenched in a position of statutory superiority in the legislature and we recommend therefore that it should be open to either community at the expiration of ten years to petition Parliament to modify the Award (J P C Report Vol I Part II Proceedings p 341)

The difficulty argument of status quo

The question of *status quo* raises another important issue We admit the force of the argument that it is always difficult to disturb an existing arrangement without the consent of the parties affected by it But it is significant that while the principle of *status quo* seems to have bound the Prime Minister and His Majesty's Government in regard to the system of separate electorates, it has not appealed to them while disturbing the Lucknow Pact on which representation of communities was generally based in 1919 It will be seen that the Lucknow Pact gave to Mahomedans in Bengal 40 per cent of the elected seats and that in accordance therewith they had in the Bengal Legislative Council of 141 members 39 elected seats as against 46 Hindu (non-Mahomedan) elected seats It must be borne in mind that the Lucknow Pact had the full approval of the Mahomedan community The provisions therein contained were elaborately discussed and considered from all points of view and finally accepted by them Mr MacDonald and his Government might be pertinently asked why the old arrangements regarding representation should have been disturbed if the doctrine of *status quo* were really a sacrosanct principle

The Upper House not to disturb the communal balance in the Lower

We have seen that the communal decision has not only introduced communal representation through separate electorates in the Second Chamber of the Federal Legislature and in the Upper House in provinces where bi-cameral legislatures have been introduced but also made it clear that such representation must not disturb the communal balance in the Lower House, and provisions have accordingly been made in the Act and the relevant Schedules to maintain the balance The object of the Upper Chamber is different from that of the latter Their respective functions are also in some respects different and so also their respective constituencies It is, therefore, not a sound doctrine that both the Houses should be so composed as to reflect to the same extent and in the same manner the communal bias or prejudice that may be prevalent in the country If the Upper House has any meaning in constitutional law, it should have some power to revise or at least to delay hasty, indiscreet and communal legislation According to the scheme outlined in the

White Paper and reaffirmed in the report of the Joint Parliamentary Committee and incorporated in the 1935 Act, that object is likely to be frustrated because in communal matters the Upper House will generally take the same view as the Lower

The scope of Sec 308

It is necessary to refer here to the controversy that Section 308 of the Government of India Act, 1935 (numbered 285 in the Bill as introduced and 299 in the Bill as amended in Committee) has provoked in India The section seeks to give the legislatures Federal as well as Provincial power if of a restricted nature to propose amendments of the constitution of the country in certain respects It is a welcome change from the nationalist standpoint inasmuch as it offers some opportunities of growth development and expansion of the constituent powers of the legislatures But a certain section of the Mahomedans have read into it a sinister move on the part of His Majesty s Government to repudiate the undertaking said to have been given by Mr Ramsay MacDonald in connection with the award * Briefly put the section lays down the procedure for altering the size, composition or the method of choosing members of the Federal or Provincial legislatures by Order in Council upon resolution by any of those legislatures on the expiry of ten years or by sub-section (4) by Order in Council at any time after consultation with and upon reference to the Governments and legislatures in India The resolution contemplated in the section must be passed in each Chamber (where there is a bicameral legislature) on the motion of a Minister on behalf of the Council of Ministers so that the Act leaves no initiative in the hands of the non-official legislators

The ten years reservation not to apply to Order in Council

The issue is whether before the expiry of ten years after coming into operation of the Act any amendment or modification of the award may be effected The late Under Secretary of State seemed to think that such modification would not be possible as being contrary to the terms of Mr MacDonald s decision Replying to the Duchess of Atholl who *apropos* of the clause enquired whether it will be

* Read Mr W Ameer Ali s letter dated London the 21st May 1935 published in the Calcutta Statesman, and the statement issued in June 1935 by Haji Abdulla Haroon and Mr Shafi Daudi.

possible by Order in Council to do away with communal electorates," Mr Butler stated "That is not the interpretation I put on this paragraph and the assurance I will give to the noble Lady is that the Communal Award is governed by the original terms of that Award, that is to say, that after 10 years if there be an agreement between the communities action will be taken by H M 's Government "* The Duchess returned to the subject on a subsequent occasion and the Attorney-General replied "I think that it will be practically impossible for the Government to use powers under sub-section (4) unless the views of the legislatures were friendly to the decision "† Thus Sir Thomas Inskip was not so bold and assertive as Mr Butler regarding the statutory protection of the award for ten years, and on reading the language used we think that the law is on the side of the former Attorney-General rather than on that of the late Under-Secretary of State It is true that except in regard to the franchise qualifications of women referred to in sub-section (3) and paragraph (*c*) of sub-section (2) nowhere in the section is the ten-year period of reservation touched An attempt may therefore be legally made under the clause to modify the Award before the expiry of ten years *only* by an Order in Council on the initiative of His Majesty's Government according to the procedure set out in detail in Sec 309

A Simla *communique*, dated the 2nd of July, 1935, issued on behalf of His Majesty's Government in the United Kingdom in explanation of the clause, states that before the expiry of ten years no constitutional initiative for modification of the terms of the award will reside in the Governments and legislatures of India Power is, however, conferred on the British Government under the relevant section to make such change by an Order in Council (always with the approval of both Houses of Parliament) even before the end of ten years, but within the first ten years and indeed subsequently, if initiative has not come from legislatures of India, it is incumbent on the Secretary of State to consult Governments and legislatures of India (unless the change is of a minor character) before any Order in Council is

* Parliamentary Debates (Official Report), Vol 300, No 76, Cols 1023 25

† *Ibid*, Vol 301, No 90, Cols 1055 69

laid before Parliament for its approval There is thus a distinction drawn with regard to the period of reservation between Indian authorities and Whitehall The former in other words, are legally prohibited from moving in the matter for ten years while the latter is empowered to effect any change with the approval of the Houses of Parliament and after consultation with the authorities in India The language of the section is not happily worded in certain respects and may give rise to conflicts in interpretation, but the intention of His Majesty s Government is clear that the Indian authorities* must wait for ten years before they can legally seek to prepare amendments to the communal decision There is, however, absolutely no restriction on the powers of His Majesty s Government acting in that behalf with the approval of both Houses of Parliament Consultation with the Indian authorities and the minorities affected contemplated in sub-section (4) of the section is left to the discretion of His Majesty which constitutionally means His Majesty s Government It may be pointed out that a statement or an explanation however authoritative its source may be cannot control the interpretation of a statutory provision whose language is clear and admits of no doubt and therefore Mr Butler was not on safe ground when he reassured the Duchess of Atholl

The MacDonald pledge in relation to the Act.

How then does the Prime Minister s pledge regarding his award stand in relation to Section 308 of the Act? Can the latter in other words override Mr MacDonald s pledge? The law is that in a case of conflict between a statutory enactment and a statement made by its framers the former should prevail and in that view of the case Mr MacDonald s pledge may be rendered null and void by Order in Council It has been asserted in the decisions of the Courts that what may be called the Parliamentary history of an enactment is not admissible to explain its meaning † The language of an Act can be regarded

* A distinction should be drawn between Indian authorities legislative and executive on the one hand and the minorities affected by the award on the other Should the latter come to an agreement amongst themselves the British Government stand committed to accept it by Order in Council in terms of paragraph 4 of Mr MacDonald s award

† Maxwell Interpretation of Statutes p 21

only as the language of the three Estates of the realm and the meaning attached to it by its framers or by individual members of one of those Estates cannot control the construction of it Indeed, the inference to be drawn from comparing the language of the Act with the declared intention of its framers would be that the difference between the two was not accidental but intentional "* Some high legal and constitutional authorities dissent from that orthodox view Professor Kennedy, for example, holds that "the real creating minds" behind a statute "should not be neglected" and cites in support a number of cases (in one of which Lord Sankey figured as a Judge) in which the relevant Parliamentary literature bearing on the statute has been examined at length † Whichever might be the correct view, there is little doubt that if the issue is contested in courts the supporters of the communal decision who rely on Mr MacDonald's undertaking will be confronted with a huge mass of authoritative legal decisions against them and be required to prove their case to the satisfaction of the courts Mr Butler's assurance or Mr MacDonald's pledge has no legal force as against a clear and definite statutory enactment The pledge must be read with the relevant provisions in the Act and not independently of them

The real protection in the procedure

The actual protection for the award is provided in the procedure itself No Minister (who under the Act can initiate proceedings for its modification only on the expiry of ten years) would conceivably sponsor a motion proposing to alter the award unless it is approved by his colleagues in the Government some of whom will as a general rule be representatives of minority interests If a Minister were so foolish as to do so, he would be forced to resign Assuming further that a resolution to that effect is adopted according to the procedure set out in the section in question, there is the Governor-General or the Governor, as the case may be, who is required to forward to the Secretary of State along with the resolution a "statement of his opinion as to the effect which the making of the proposed amendment would have on the interests of any minority," and the Secretary of State

* *Ibid*
† W P M Kennedy Essays in Constitutional Law, pp 166 67

shall cause such statement to be laid before Parliament Having regard to the powers conferred upon the Governor General or the Governor acting in his discretion under the new constitution, one may rest assured that this protection is bound to be real and effective against any decision of the legislatures prejudicially affecting the interests of minorities If the Secretary of State decides to take the initiative himself and that power always belongs to him, it is clear that he has to consult the Indian authorities before the final decision is taken and there is no reason to believe that the Indian authorities will have no minorities representation Then again an Order in Council contemplated in the section must require an affirmative vote in both Houses of Parliament* which means that an amendment of the award according to this procedure must be approved by a majority in the Commons and the Lords If such a majority could be secured the award might as well be altered by an amending Act of Parliament as by an Order in Council In a certain sense the Order in Council procedure affords greater protection than an Act of Parliament inasmuch as the Lords and the Commons will have equal and identical jurisdiction under Sec 309 The changes effected, therefore are that the Act provides a means of modifying the award in addition to the ordinary Parliamentary procedure and that the ten years reservation is abolished only with regard to an Order in Council promulgated on the initiative of British authorities It is however clear that no initiative in the way of amending the award will be taken by His Majesty s Government unless there is an agreed solution in India by the parties concerned The effect of the changes is apparent and not real although from the constitutional standpoint they may have some theoretic value

Whether Mr MacDonald s decision an arbitral award

The question has been raised as to whether the communal decision of His Majesty s Government is in the nature of an arbitral award In this connection reference has been made by Sir Nripendranath Sircar to the proceedings of the Consultative Committee of the Round Table Conference which was constituted

* Sec. 309

to work in India Attention has been invited to the view expressed by certain Moslem members of the Committee stating that they would not accept the Prime Minister's decision if it went against them and also to statements made by certain Hindu delegates to the Round Table Conference including Sir Provas Chunder Mitter declining to agree to arbitration As regards the attitude of the Consultative Committee, Sir Nripendranath's conclusions are (1) that members of the Committee did not agree to arbitration, (2) that the Moslem delegates repeatedly stated that they did not ask for any arbitration and that they would claim the right to challenge any decision on its merits and (3) that there was no Bengal Hindu on the Committee and that no reference was made at any time to anybody in Bengal for enquiring as to whether the Prime Minister or the British Government should be asked to settle the dispute Sir Nripendranath's statement on the position so far as it goes is correct and his conclusions are not open to challenge, but the question he has raised regarding the nature of the decision seems to us to be theoretical Whether an award or a decision, it stares us in the face It is on the saddle All that can be said, however, is that neither the communities concerned had given Mr MacDonald authority to arbitrate, nor has his decision as it finally emerged received the approval of the major section of Indian public opinion

A fit subject for international arbitration

But the real question is whether in such a matter as the protection of minorities in India there was no method open to His Majesty's Government for solving the problem other than the one they had adopted Their policy and attitude are unfortunately looked upon with suspicion by a considerable section of Indian public opinion That suspicion has been strengthened considerably by the provisions in their communal decision which has extended the principle of communal representation through separate electorates and failed to do justice to certain communities and is bound to affect prejudicially the growth and development of parties along political and economic lines In these circumstances, the best and safest course would have been, in our judgment, to refer the entire prob-

lem of minorities protection to a competent and impartial body of international experts That method should have appealed to Mr Ramsay MacDonald in view of the sensible and clear view he had previously expressed advocating the application of the League principles of minorities protection to old States * Such experts are available from amongst British as well as Continental statesmen Reference of the Indian problem to an international body would not have introduced any innovation into public law Both the British Government and the Government of India are original members of the League of Nations and are parties to the Minorities Guarantee Treaties and they might have called in the assistance, for such a great propose, of the international machinery which they have themselves helped build up It does not mean however that the adoption of such a procedure would have involved the United Kingdom and India in acceptance of the provisions of the Minorities Treaties in all their details and the method and procedure of League supervision and control A Tribunal of international experts might have laid down certain principles of minorities protection for operation in India within the competence of her Municipal law without prejudice to the sovereignty of the authorities concerned It is unfortunate that His Majesty s Government could not have seen their way to have recourse to such a procedure

Separate electorates opposed to responsible Government.

We are of opinion that communal representation by separate electorates with which is closely associated the principle of weightage for certain communities at the expense of others cannot make for nationalism It is generally against all precedents in history and is likely to sap the foundations of Parliamentary Government, dividing as it does a whole nation into permanent water tight communal compartments It tends to perpetuate communal bias and prejudice among the communities and to give communal colour to legislation * It is also to be noted that once the principle of separate communal representation is accepted, there is no knowing when and where it will end and in India we have got ample proof

* Page 37 supra.

of it Weightage comes in its train and weightage, as Mr MacDonald has himself pointed out, cannot be created out of nothing. It is created for the benefit of certain communities at the expense of others The result is an atmosphere charged with suspicion and mistrust

We have not yet had any responsible Mahomedan politician or any politician claiming to represent the interests of any other minority community suggesting a scheme of government different from the system in which the executive is held responsible to the legislature There are of course some politicians who insist on complete responsibility both at the centre and in the provinces immediately, there are others who will not mind reaching the final stage through a process of steady growth and evolution But they all agree that responsible government as it is technically understood in the United Kingdom and the self-governing Dominions should be our definite goal That being so, it is essential that every attempt should be made to lay the foundations broad and secure Unless, therefore, the general plan of government outlined at the Round Table Conference and embodied in the Act is substantially modified there seems to be no alternative to a common electoral register But the scheme of electorates should be so devised as to give a fair and reasonable opportunity to different interests and communities to secure adequate representation in legislative bodies, and that can be attained if the electorates are based on adult suffrage In this connection Mahatma Gandhi's suggestion* that the electoral circles should be so determined "as to enable every community to secure its proportionate share in the legislature" deserves somewhat detailed treatment. An attempt will therefore be made in the next chapter to examine the principles of adult suffrage and proportional representation

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* Mahatma Gandhi's supplementary note on the Congress scheme circulated among delegates to the Round Table Conference

CHAPTER XV

Adult suffrage and Proportional Representation

Adult suffrage as basis of democracy

Democracy has been defined by Lincoln as the government of the people, by the people and for the people Whether that maxim applies to every State that calls itself a democracy is open to question But there is no doubt that a real democracy must provide a machinery through which the will of the average citizen as Professor Laski * remarks, has channels of direct access to its source of authority In that context the need for adult suffrage in a modern democratic State requires no stressing Every adult citizen should have the right to indicate at the polling booth what persons he desires to entrust with the task of govern ment And there is no better and more effective method by which to secure adequate representation of minorities in legislatures and public bodies than the system under which every person can make his influence felt in the shaping of policy at Government headquarters The right to franchise is therefore an invaluable asset The United Kingdom has adopted adult suffrage after years of bitter struggle There is hardly any post-war constitu tion in Europe which has not introduced it

Modern democracies have accepted adult suffrage

We find for instance, that all citizens of the Irish Free State without distinction of sex who have reached the age of twenty-one years have the right to vote for members of the Lower House and to take part in the referendum and initiative † The constitution of the Kingdom of the Serbs Croats and Slovenes‡ has laid down that every male citizen by birth or naturalisation who has completed his twenty first year shall have the right to vote In the Polish Republic the franchise has been

* Laski *A Grammar of Politics* p 115

† The Irish Constitution Act Art. 14 Note the constitutional changes effected

‡ The Constitution of the Kingdom of the Serbs Croats and Slovenes Art. 70

extended to every citizen without distinction of sex who has reached the age of twenty-one years on the date when the election is held and who is in full enjoyment of civic rights and has been domiciled in the electoral area, and members of the Diet are elected by universal, secret, direct and equal franchise, exercised in accordance with the principles of proportional representation * In Austria the National Council is elected by the people on the basis of equal, direct and secret suffrage of men and women, who before the first day of January of the year in which the election takes place, have passed their twentieth year, and in accordance with the principles of proportional representation † In Esthonia every citizen who has reached the age of twenty years has the right to vote provided he has been an Esthonian subject for a period of not less than one year, and the State Assembly is elected by universal, equal, direct and secret suffrage on the basis of proportional representation ‡ The Czecho-Slovakian constitution has conferred the franchise for the Chamber of Deputies on all citizens without distinction of sex who are twenty-one years old and the House again is elected in accordance with the principles of proportional representation § Similarly in Germany the Reichstag is elected by universal, direct and secret suffrage of all men and women above the age of twenty upon the principles of proportional representation || Adult suffrage has been adopted in Russia by the recent constitutional changes

In Canada the franchise, both Federal and Provincial, is in the main adult suffrage under the Act of 1920, although restrictions apply to certain Asiatic peoples and the North American Indians Newfoundland also enjoys manhood suffrage under the constitution, at present suspended, with votes for women over twenty-five years The Australian Commonwealth and its constituent States have introduced adult suffrage with restrictions on certain classes of people Adult suffrage exists in New Zealand, in the

* The Polish Constitution, Arts 11 and 12
† The Austrian Constitution, Art 26 Note the recent constitutional changes
‡ The Ethonian Constitution, Arts 27 and 36
§ The Czecho Slovakian Constitution, Arts 8 and 9,
|| The German Constitution, Art 22

Cape, Natal, the Transvaal and the Orange Free State in South Africa for white citizens both for Union and Provincial elections There is no colour bar in the Cape but non whites are required to satisfy educational and property qualifications In Natal South African natives and British Indians are practically excluded In the Transvaal and the Orange Free State suffrage is denied to non whites The introduction of female suffrage in certain Union Provinces both for Union and Provincial elections has been prompted by the desire as Professor Keith says, to minimise the value of the native vote * Adult suffrage is the general rule in the self-governing Dominions and the restrictions such as they exist are based on racial grounds It is, however to be understood that the right to franchise even where there is adult suffrage is as a general rule confined to citizens as opposed to aliens and is subject to certain other legal restrictions such as those which exclude from the franchise persons of unsound mind and persons adjudged guilty of acts involving moral turpitude In most of these countries in Europe the problem of minorities protection has been sought to be solved, as we have seen by International Treaties under the auspices of the League of Nations Besides adult suffrage is claimed to have given minorities an opportunity to have their views represented to some extent in the legislatures concerned

The size of the Indian electorate.

We do not see why this generally recognised right in democracies should be withheld from the people of India when a large transference of power especially in the provinces has been effected The franchise under the India Act of 1935 has however been considerably widened The total gross electorate in British India is estimated to be 35 000,000 male voters being 29 000,000 and female voters being 6 000 000 The percentage of the total electorate to the total population is just under 14 per cent and to the total adult population 27 per cent The percentage of the total male electorate to the total adult male population is 43 per cent The adult population is about half the total population which in British India is about 260 000,000 Of the women voters 2 000 000 are qualified by property 4 000 000 by wifehood and 300 000 by education †

* The Governments of the British Empire p 408

† Par Debates May 1935

Qualifications for franchise in territorial constituencies are under the Indian law dependent in the main on taxation of different kinds, local, Provincial, or Central, ownership of property or educational fitness while women may have an additional qualification by wifehood.* These qualifications, while they have been determined by the same considerations throughout British India and are intended to secure the same end, vary more or less from province to province according as circumstances seemed to have suggested In Bengal, Bombay, Bihar, Orissa and Sind, for instance, the matriculation examination or the school leaving certificate or any examination prescribed to be equivalent† to either is at present the minimum qualification, but in Madras literacy, in the United Provinces the upper primary examination, in the Punjab the primary examination, in the Central Provinces and Berar an examination which qualifies for admission to a course of study for a degree of the Nagpur University, in Assam the middle school leaving certificate and in the North-West Frontier Province the middle school examination for an urban constituency and the primary examination for a rural constituency, are considered sufficient for the purpose

Different standards in different provinces

Similarly qualifications based on taxation also differ from province to province, and they are specified in detail province by province in the relevant Schedule to the Act It is not difficult to explain lack of uniformity in these qualifications for different units, but so much divergence in educational standards between a province and a province does not seem to be justified If literacy could be adopted for Madras, there is no reason why it could not be made to apply to Bengal or Bombay. For special constituencies such as Universities, Commerce, Industry, Planting, etc , Landholders and Labour, the qualifications have necessarily each a different basis, and in this respect also they vary more or less from province to province as is clear from the Schedule in question The qualifications for franchise for the Upper House, wherever it exists,

* Sixth Schedule to the Government of India Act, 1935, Part I, para 10

† Power is given in Bengal to prescribe any other examination for the purpose, not being lower than a final middle school examination Like power *mutatis mutandis* is enjoyed by other provinces also

are of course distinctly higher than those required in respect of territorial constituencies of the Lower Chamber and in Bengal, to give one illustration, a higher standard is demanded for 'general' constituencies of the Upper House in regard to land revenue or rent or road and public works cesses as compared with Mahomedan constituencies, and, so far as the "general" constituencies themselves are concerned, a higher standard in this respect for the Burdwan and Presidency Divisions than for the Dacca Rajshahi and Chittagong Divisions * It may be noted that it has been laid down in the appropriate Part of the Sixth Schedule relating to Bengal that no man shall be included in the electoral roll for or be entitled to vote at any election in, any Mahomedan constituency specially formed for the election of persons to fill the seats reserved for women † a restriction that does not apply to a general or Anglo-Indian constituency reserved for women This provision in law is perhaps justified by the rigidity of the *purdha* observed among Mahomedans as a class There is little defence for the disparity in the general requirements as to residence as between Bengal and some of the other provinces such for instance as Madras Bombay the United Provinces and the Punjab and a place of residence which a person qualified to be included in the electoral roll of a territorial constituency is required to own has been defined to mean in Bengal a place *where a person ordinarily and actually resides during the greater* part of the year ‡ As in other countries the right to franchise is affected by certain legal disabilities as prescribed by law § Nor is it open to any one in a territorial constituency unless he is either (*a*) a British subject or (*b*) the ruler or subject of a Federated State or (*c*) if and in so far as it is so prescribed with respect to any province and subject to any prescribed conditions the Ruler or a subject of any other Indian State ‖

* The Government of India (Provincial Legislative Councils) Order 1936 Part IV paras. 3 and 4

† Part IV para. 10 (Sixth Schedule)

‡ Part IV para 1 Part II para 1 Part III, para 2; Part V para 1 and Part VI para 1 (Sixth Schedule)

§ Part I paras 4 8 and 9 (Sixth Schedule)

‖ Part I para 3 (Sixth Schedule) For detailed treatment of how franchise is restricted to British subjects with minor exceptions see Chap XVII *infra*

Franchise and the joint family

So long as qualifications for franchise are based on property or taxation as taxation is understood in the broad sense, in which it has been used in the Sixth Schedule to the Act, franchise is bound to be restricted where there exists the joint family system, for the law contemplates that not more than one member of such a family is entitled to be included in the electoral roll even if the total payment that is made on behalf of the family is, say, hundred times the minimum sum required for necessary qualifications As regards Bengal, it is laid down that where property is held or payments are made jointly by, or assessments are made jointly on, the members of a joint family, the family shall be adopted as the unit for deciding whether the requisite qualification exists; and if it does exist, the person qualified shall be, in the case of a Hindu joint family, the manager thereof and, in other cases, the member authorised in that behalf by the family concerned This is not to apply where members of a joint family have separate accommodation and separate messing, and in such a case each member's share of the property, payment or assessment is to be taken into account in preparing the electoral roll.* Note should be taken of the fact that there must be both separate accommodation and separate messing to enable a member of a joint family to get the benefit of the proviso † Analogous provisions have been made in the Schedule for the other provinces also With the growth of political life and greater interest in public affairs than at present property or taxation as a basis for franchise is bound to act as a deterrent on the joint family system.

The procedure of amendment

Power has been reserved to His Majesty in Council by Order under Sec. 291 to make provision with respect to franchises and elections, and in exercise of that power the Provincial Assemblies Order, 1936, and the Provincial Councils Order, 1936, have been issued By Sec. 308 he has power by Order at any time to make such amendment in the provisions of the Act as is specified in sub-section (2) of the section subject to the proviso dealt with in

* Sixth Schedule, Part IV, para 14

† The expression "and" used here is obviously conjunctive

the preceding chapter In so far however, as no proceedings can be taken in relation to the draft of an Order laid before Parliament by the Secretary of State except in pursuance of an address presented to His Majesty by both Houses of Parliament praying that the Order may be made either in the form of the draft, or with such amendments as have been agreed to by resolutions of both Houses the control of both the Houses over such delegated legislation by the executive has been provided for at least in theory and may on occasion be exercised in practice While therefore, the King in Parliament is competent at all times by virtue of his supreme law making powers to amend the Act or any Order made thereunder and His Majesty in Council can by Order deal with franchise elections the method of voting and such other matters as are specified in ss 291 and 308 subject to certain specific directions contained in the Act, the Indian legislatures Federal or Provincial are given no power to amend or modify the existing law The only concession made is that the Federal legislature on the expiry of ten years from the establishment of the Federation and the Provincial legislature on the expiry of ten years from the commencement of Part III of the Act can on the motion proposed in each Chamber by a Minister on behalf of the Council of Ministers pass a resolution recommending such amendment in the Act or Order in Council made thereunder as is mentioned in clauses (a) (b) (c) and (d) of sub section (2) of section 308 of the Act Only with regard to franchise for women as referred to in clause (e) the ten year bar does not apply so that in that respect a resolution as contemplated in sub-section (1) may be adopted at any time

Opposition to adult suffrage

Now Sir Sivaswamy Aiyer has expressed his disapproval of adult suffrage He is of opinion that the poverty and illiteracy of the large masses of the people justify a serious doubt as to their fitness to exercise the franchise * While stressing the principle that the franchise should be as broad as circumstances in each province may permit Sir Sivaswamy has stated that it should be based upon the ground of ownership, or occupation of property liable to tax or rent, or the exercise

* Aiyer : *Indian Constitutional Problems* p. 49

of some calling and the receipt of an income liable to taxation in some form or other " He has not proposed any literacy test, but after quoting from Whitaker's Almanac and tracing the Reforms Acts in Great Britain from 1832 down to 1884, he has told us that " in view of the illiteracy and poverty of the people it is not possible to introduce democracy at once on as broad a basis as has now been adopted in England after eighty years of political training and economic and educational progress "*

Legislatures under limited franchise tend to be sectional

All the points raised by Sir Sivaswamy Aiyer are the oft-repeated arguments against universal adult suffrage But it is a simple truth that when the body of voters is limited the welfare realised by the State tends to exclude that of the persons excluded from franchise " No test," observes Professor Laski, " has been devised which enables us to limit the franchise in such a fashion as to equate civic virtue with possession "† If the franchise is confined to a particular caste or creed or class, the legislature is bound consciously or unconsciously to discriminate against the class or creed or caste deprived of the franchise If it is confined to property-holders, the State will as a matter of course be tempted to confer undue privileges upon those who own property A cursory glance at the history of legislation in any country will make this point clear The Parliamentary Acts democratising the English constitution came by slow stages not because Parliament was always convinced that time was a great healer of all evil but because the forces of democracy had to fight against great odds The Factory Acts came into existence not because the factory-owners as a body believed in self-denying ordinances but because the factory labourers came to force their way into the polling booths and subsequently into Parliament

Education not a dependable test

Nor is John Stuart Mill's education test related to the qualities which the State requires Carried to its logical conclusion, it becomes an unreliable test What, it may be asked, is a scientist worth in the high affairs of State if he has not the capacity to

* Aiyer *Indian Constitutional Problems*, p 50
† Laski *A Grammar of Politics*, p 115

decide on a complicated tariff problem with which all modern Governments are constantly faced? How can a profound philosopher who has learnt to despise the Dismal Science help a modern State if he has not the inclination to go minutely into the intricacies of the exchange problem and the clearing house? All that the scientist or the philosopher can contribute is to bring a broad human outlook to bear upon discussions in the legislatures But that is not the only end of democracy And the test of efficiency is not observed even in the United Kingdom Were the British voters—each and every one of them—competent to assess the implications of the Parliament Act of 1911 when they kept in power the Asquith Government? Were the adult population of England—every Englishman and English woman—in any way better when they installed in 1931 the National Government in Whitehall with a Labour leader as Prime Minister and a Conservative tariff reformer as Chancellor of the Exchequer? There is something like a fetish of efficiency which ought to be guarded against in the interest of democracy

Advocates of democracy are not afraid of its risks and pitfalls For democracy lives, grows and develops by the method of trial and choice When it is said that a voter has not the requisite knowledge to take a dispassionate decision and to give a reasoned choice, the answer is that the State must arrange and organise on his behalf and in his interest access to that knowledge And that the State will hardly arrange and organise unless the general public irrespective of caste, creed, colour, property, education or sex have acquired the right to influence its decision and to regulate its conduct and to s t in judgment on its policies and acts It is very difficult to secure the protection of the interests of minorities unless the legislature is elected on the basis of adult suffrage particularly in a country like India where minorities generally are educationally backward and economically inefficient If, as by the Act of 1935 the qualification based on possession could be brought down to six annas per annum as union rate as in Bengal and literacy could be fixed as the minimum educational standard as in Madras, how long is the journey s end unless considerations of administrative inconvenience and private or pub-

lic expenditure intervene to block progress? The moral victory already belongs to the advocates of adult suffrage, the ultimate victory for them is perhaps only a question of time

Proportional Representation in India

It has been seen that as a means of securing in legislatures fair and adequate representation of minorities post-war democracies in Europe have adopted not only adult suffrage but also proportional representation * In Mahatma Gandhi's supplementary note appended to the Congress scheme there was a definite and clear suggestion in favour of proportional representation † The principle of proportional representation has been adopted in the constitution of the Indian National Congress as amended at its Bombay session in 1934 ‡ It has also been accepted in connection with elections for certain constituencies under the Government of India Act, 1935, for instance, in the election of persons by members of the Provincial Legislative Assemblies to fill certain seats in the Upper Houses§ and in the election of persons to fill seats in the Federal Assembly by the Provincial Assemblies ‖ The Joint Parliamentary Committee appointed to consider the Government of India Bill of 1919 also expressed the view that " the principle of proportional representation may be found to be particularly applicable to the circumstances in India "¶ The points that require to be examined in this connection are (i) what is proportional representation, (ii) whether it is an effective means of securing adequate representation of minorities, and (iii) whether it is applicable to India

Proportional representation involves a somewhat drastic change in the orthodox method of voting and abolition of single-member constituencies ** Under such representation by means of the single transferable vote each elector while recording his vote shall place on his ballot

* See pp 446 447, *supra*

† See Chap XIV, *supra*

‡ Art VI (g) (IV), Art XVIII (b and c)

§ Fifth Schedule, cl 14(c)

‖ First Schedule, cl 19

¶ See Chap XIV, *supra*

** *Proportional Representation*, 1867 1917, by Lord Eversley, revised edition, The Royal Commission on Electoral Systems, 1910 (Cd 5263),

paper the figure 1 in the space opposite the name of the candidate of his first preference and apart from the first preference vote which is popularly known as the original vote, he may, if he so desires, place on his ballot paper the figures 2, 3, 4, 5, 6 and so on according as there are seats or vacancies to be filled, in the spaces opposite the names of the other candidates in the order of his preference A ballot paper is not valid unless the figure 1 is marked on it in the space opposite the name of a candidate * It means that an elector may, should he so desire, reserve all his preferences save his first preference in the absence of which his ballot paper is rejected The procedure then to be followed is that the total number of valid papers that is to say papers on which the figure 1 has been correctly marked is divided by a number exceeding by *one* the number of seats or vacancies to be filled and the result added by *one* disregarding any fractional remainder if any is called the quota which would secure the return of a candidate

The quota in single transferable voting

Take for the purposes of illustration a four member constituency with six candidates In order that his ballot paper may not be rejected each voter shall mark 1 in the space opposite the candidate of his first choice and may or may not mark his other preferences which in this case cannot exceed 4 Take further the number of valid papers to be 100 000 A candidate who secures the quota *i e* $\frac{100\ 000}{4+1}+1=20\ 000+1=20\ 001$ votes would be declared to be elected In the middle of the nineteenth century a Danish Minister called Andrae gave a quota which was obtained by dividing the number of valid ballot papers by the number of seats or vacancies to be filled In the present instance the quota under that system would be 25 000 instead of 20 001 It is popularly known as the Hare system after the

* For clear enunciation of the principle as well as the method read the *Bengal Legislative Council Manual* 1924 pp 290-97 and the Bengal Legislative Council Electoral (Conduct of Elections) Rules 1936 made by the Governor in Council in exercise of the powers conferred by Paragraph 20 of the Fifth Schedule to the Government of India Act 1935 read with Paragraph 23 of Part I of the Government of India (Provincial Legislative Councils) Order 1936.

name of that famous Englishman, Thomas Hare, who took special care to popularise it Yet another method named after Hagenbach-Bischoff postulates a quota which is secured by dividing the number of valid papers by a number exceeding by *one* the number of seats or vacancies to be filled Under that system the quota would be in the present case 20,000 instead of either 25,000 or 20,001 According to general practice at present followed, the quota would be 20,001, the figure cited first If four candidates out of six obtain the quota, viz , 20,001 each, or more, no complications at all arise They do arise when less than that number obtain or obtains the quota, and then comes the question of distributing the preferences or "surpluses" as they are known If the number of valid votes credited to a candidate is greater than the quota, the resulting surplus is to be transferred to the "continuing" candidates indicated on the ballot papers in the parcel of the elected candidate as being next in order of the voters' preferences If the total number of transferable papers is equal to or less than the surplus, the papers are to be transferred to the "continuing" candidate or candidates marked as the voters' next preference If, however, the number of transferable papers is greater than the surplus, the number of papers transferred in each case shall bear the same proportion to the number of transferable papers as the surplus bears to the total number of transferable papers The number of papers to be transferred in each case, when the surplus falls short of the total number of transferrable papers, is to be ascertained by multiplying the number of transferrable papers in each case by the surplus and dividing the result by the total number of transferrable papers

The surplus and its distribution

Suppose A, B, C, D, E, and F are the candidates in the present case and B and D have respectively secured 30,001 and 25,001 original votes B is thus left with a surplus of 10,000 and D with a surplus of 5,000 Suppose further that B's parcel contains 20,000 transferable papers 15,000 being marked E and 5,000 F, and D's parcel contains 15,000 transferrable papers, 10,000 being marked A and 5,000 C As the general rule is that if more than one candidate has a surplus, the largest surplus is to be first counted and distributed, B's transferrable papers

pite the fact that they have not reached the quota, and if only one vacancy remains and if the votes credited to one continuing candidate exceed the total votes of the other continuing candidates, together with any surplus not transferred, that candidate is returned.

In certain countries, however, if vacancies exist and no continuing candidates reach the quota after the transfer, the political party which polls the majority of original votes is favoured, while in others the seats are distributed among the political parties in proportion to their original voting strength with some bias in favour of the minority party.* The best procedure is to leave as little discretion as possible in the hands of the Returning Officer and to attempt at a precise and detailed definition of rules. It would be wrong to suppose that under proportional representation by means of the single transferable vote the candidates, who get the highest number of first preference or original votes, will necessarily be declared elected to fill the seats or vacancies to the exclusion of others unless of course they reach the quota. It may happen that a candidate with a much smaller number of "originals" to his credit would be returned to the exclusion of a rival, but such a thing can happen only when the "rival" concerned fails to reach the quota notwithstanding his greater number of "originals" or first preference votes. "The system," observes Sir John Marriott, "demands the most scrupulous accuracy and some intelligence on the part of the counters, but on the part of the voters no more of either quality than is involved in 'picking up' a cricket eleven save that the "picking" must be all in one process and on paper instead of

The counting difficult and tedious.

* Reference has been made in the preceding chapter to the rule made by the Governor of Bengal indicating how a casual vacancy is to be filled. A rule or order restricting membership or franchise to a particular religious or racial community in respect of a by election by members of the Lower House to fill a casual vacancy in the Upper House is *ultra vires* having regard to the clear provisions of the Statute and the relevant Schedule. The election of a European by European members of the Bengal Assembly to fill a vacancy in the Council caused by the resignation of Sir George Campbell some time in August, 1937, was therefore *prima facie* improper and invalid. It is of course difficult to apply single transferable voting in filling a single casual vacancy, and different methods have been suggested such as (*i*) keeping the seat vacant until another vacancy occurs, (*ii*) dividing a territorial constituency into a number of units equal to that of members

viva voce * But at first sight the method of counting and transferring votes seems to be confusing and extraordinarily complex

It secures fair and adequate representation for minorities.

Experience has proved that under the system of proportional representation minorities generally secure representation in the legislatures proportionate to their voting strength in the constituencies The Proportional Representation Society in England have been for years engaged in collecting statistics from different parts of the world regarding the results of elections Figures show that the Society are justified in claiming that the system of proportional representation, whose adoption they advocate is the only effective device (with the exception of separate electorates) of securing for minorities adequate representation in the elective public bodies † In the Irish Free State elections of 1927 the Cosgrave party polled 30·2 per cent of the votes and obtained 27 7 per cent of the seats Fiana Fail polled 28 8 per cent of the votes and obtained 26 3 per cent of the seats Labour polled 14 8 per cent of the votes and obtained 12 5 per cent of the seats Independents polled 9·2 per cent of the votes and obtained 12 5 per cent of the seats Farmers polled 7 2 per cent of the votes and obtained 9·2 per cent of the seats National League polled 5·2 per cent of the votes and obtained 7 2 per cent of the seats and Sinn Fein polled 4 6 per cent of votes and obtained exactly the same percentage of the seats The exact proportion was not maintained in every case but the percentage of the seats secured by each party was approximately proportionate to the percentage of votes and a general tendency is noticeable that the smaller the groups the greater their ratio of representation as compared to their voting strength The results of the German elections of 1920 revealed the same tendency With 21 6 per cent of the votes polled the Social Democrats obtained 22 2 per cent of the seats and polling

returned by it and (i i) re-opening the old packet and announcing the result in accordance with the next available preferences Each of those methods has obvious disadvantages The issue however is not one of much practical importance in view of the small number of casual vacancies that may occur during the life-time of a legislative body

* Marriott *The Mechanism of the Modern State* Vol. I p 407

† Read the bulletins published by the Society

18 3 per cent. of the votes the Independent Socialists obtained 19 1 per cent of the seats.

Evils of the simple majority principle

In Canada, especially in Quebec, the evil results of the majority principle are not seriously contested, but the Dominion has successfully resisted the proposal to adopt proportional representation. It is argued that the adoption of such a system would create unwieldy constituencies and bring into existence groups which might render the task of administration extremely difficult In 1923 the Canadian Lower House rejected proportional representation by 90 votes to 72 against Mr Mackenzie King's advice. It should be remembered that in 1926, the Liberals in Manitoba with 38,000 votes as against 83,000 captured seven seats to none * One of the reasons why the Dominion prefers the old-fashioned manner of voting is " the normal absence of more than two great parties "

In the Commonwealth of Australia the system followed is to compel the voter to mark his preferences to enable one of the candidates for a Parliamentary seat to secure an absolute majority Preferential voting in single-member constituencies is followed in the Commonwealth, New South Wales (which has given up proportional representation), Victoria, Queensland and Western Australia In Professor Keith's opinion, it is not a satisfactory system, but he admits that proportional representation proper with six five-member constituencies adopted in Tasmania " works out with admirable mathematical accuracy and is popular "† He admits further that if it makes for weak governments, that is inevitable because the State is more or less divided in political views between supporters and critics of Labour views We have it also on his authority that proportional representation has stood the Irish Free State in good stead inasmuch as no party there has since 1922 obtained an exaggerated majority thereby giving the Independents and the representatives of Labour and agricultural interests the opportunity of exercising some measure of control over the action of the Government of the day ‡ In the general

* There is proportional representation in Winnipeg with a ten-member constituency

† Keith *The Constitutional Law of the Dominions*, p 199

‡ In 1923 the South African Union Assembly rejected proportional representation by 65 votes to 20 despite the support accorded it by General Smuts

elections of 1937 Mr de Valera failed to secure an absolute majority in the Dail with the result that he will have to depend for support to his schemes of constitutional reform on Labour or on members who have no rigid political affiliations *

All these facts together with the deplorable results of elections in Great Britain † point to the necessity of exploring the possibilities of the system of proportional repre sentation in India because it is just likely that there would be more than two clear-cut parties here Besides, the electoral method should be so devised as to enable non-communal parties to check any hasty action of the Government and to influence legislation In Great Britain all are single member constituencies save the City of London Dundee 10 English Boroughs, the Universities (Oxford Cambridge and English Universities) with 2 members and the Scottish Universities with 3 The principle of propor tional representation applies under the Act to contested elections in University constituencies, where there are two or more members to be elected by means of the single transferable vote ‡ Under the same section of the statute proportional representation may be applied to certain other constituencies at a general election, if and when a scheme is prepared and approved by Parliament No such scheme has yet been adopted so that in all the constituencies save those of the Universities the results of voting are decided by the simple majority principle

The question of applicability of the system to India ought to be discussed with reference to its relative merits and demerits Thomas Hare and John Stuart Mill were the earliest and most zealous advocates of proportional representation In 1861 Mill wrote in his *Representative Government* The pure idea of democracy is the government of the whole people by the whole people equally represented In a really equal democracy

* In December 1937 the new Irish constitution was formally inaugurated.

† In 1929 writes Professor Keith in his *The King and the Imperial Crown* (pp. 210-11) the Conservatives with 38 per cent of the votes had 258 seats Labour with 36 per cent 289 seats and the Liberals with 23 per cent only 58 seats. In 1931 the Con servatives won 473 seats in lieu of 270 In 1935 11 780 000 votes secured for the National Government 405 contested seats 8,325,000 won for Labour 141 seats and 1 445,000 secured 21 Liberal seats thus roughly 29 000 votes secured a Government seat 59,000 a Labour seat and 69 000 a Liberal seat

‡ 7 and 8 George V C. 64. s. 20

every or any section should be represented not disproportionately, but proportionately A majority of electors would always have the majority of the representatives, but a minority of the electors would always have the minority of the representatives " Advocates of proportional representation contend that the present arrangement of single-member constituencies is artificial and arbitrary Referring to the British system Mr Ramsay MacDonald said that it turned the body of electors into a disorganised crowd and broke the unity between the local governing groups and Parliament * Speaking in the Lords on the *Representation of the People Bill* in 1918 Lord Bryce similarly expressed his strong condemnation of the existing system of the division of English constituencies

Arguments in favour of proportional representation

The two main arguments in favour of proportional representation are (1) that it is possible by the system to secure a legislature which would reflect more accurately the opinion of the nation or, in other words, of the electorate, than by any other method, and (2) that in a democracy it is not only desirable but imperative that every *bona fide* opinion prevalent among the electors should be represented in the legislature, as nearly as possible, in the same proportion in which it exists among the electors. Unless the proportion of the strength of each party in the constituencies, it is contended, is accurately reflected and represented in the legislature equality cannot be attained and justice cannot be secured for all, and equality and justice are the basic foundations of democracy Democracy, in such circumstances, becomes identified with a government of the majority and not of the whole people and as a result the policy of the State is directed towards securing rights and priviliges for the majority often to the prejudice of the minority There is no doubt that every minority should in a real democracy have an opportunity of securing some representation in the legislature of the country and influencing to some extent at least its policies and acts But the contention on which proportionalists lay special emphasis, namely, that every opinion should not only find effective expression in the legislature, but should also be represented in it by the same proportionate number of votes which it obtains from the voters at an election,

* MacDonald *Socialism, Critical and Constructive*, p 253

raises a somewhat different issue The two issues should not be confused and while the justice of the first case is admitted, the second is controversial

Dicey * has raised three objections to the system of propor tional representation First, the legislature is not a debating society it formulates policy and is concerned, indirectly though, with the ad ministration of the country If the government is to be strong stable and effective, unity of action is of more conse-quence than a variety of opinion It does not, however, mean that influential opinion should gain no hearing in the legislature it should have a hearing But such a result, Dicey suggests, could be obtained if one member represented it in the legislature instead of ten or twenty members To this the answer is that ten or twenty members representing the opinion of a minority can in fluence the decisions of the legislature more effectively than one member Professor Laski † has elaborated in some detail Dicey s argument He says that minorities can always be sure of reasonable representation in the State so long as they are able to make their views articulate and organised to give them driving power The two-party system he adds, produces a conflict sufficiently acute to make both of them anxious for ideas likely to attract popular support Professor Laski does not answer the point that the greater the number of representatives of minorities in the legislature the greater the chance of making their views articulate and organised As for the danger of imperilling the stability and strength of the administration it may be pointed out that the old British idea of the unity of the Cabinet is in the process of disruption even in the United Kingdom itself The House of Com mons is no longer a two-party House indeed the two-party system has gone never perhaps to return The Britisher shows no signs of alarm at this he is fast adapting himself to new circumstances The formation of a National Government under Mr MacDonald s leadership proves it It is further proved by a rather hasty action taken several years ago in enabling members of the Cabinet to speak

Arguments against it.

* Dicey op. cit. *Introduction*, pp. lxix lxiii.
† Laski : *A Grammar of Politics* pp. 316-18

against each other and vote according as they liked on certain important questions of policy, a development in constitutional technique which fortunately was nipped in the bud The British Prime Minister then preferred to play the role not of an undisputed leader as before but that of a *primus inter pares* as on the continent Whether the Continental System is likely to prove " fatal to Government as a practical art " in all countries remains yet to be seen

It strengthens the position of the professional organiser

Secondly, proportional representation, it is argued, complicates the system of popular election, tends to intensify the complexity of choice and increase the power of the professional organiser in politics That these are the general consequences of proportional representation is admitted The creation of multiple-member constituencies and voting on the party ticket as a whole deprive the voters to some extent of their initiative and make them demonstrably more dependent on party machines and destroy the personal relations between the member and his constituents But are we entirely immune from these consequences under a system in which the majority principle prevails? Voters in the United Kingdom are at the mercy of party cliques or organisations almost to the same extent as in other countries There also they vote for parties and not for persons, and the contact between them and their representatives in Parliament is neither frequent nor very intimate Of course the importance of party organisations is more emphasised in multiple-member constituencies where there is bloc-voting than in single-member constituencies where the majority principle is the rule But there is no help for it if the organisations representing minorities are to have a real voice in the control of policy The principle of proportional representation cannot, therefore, be rejected on this ground

It fosters the evil of log rolling

Thirdly, proportional representation not only tends to promote the existence in the legislature of numerous party groups but also fosters the evil of log-rolling which means that certain members of the legislature pledge their support to a particular group or groups not because they represent the cause in which they

believe but in return for the help which the group or groups render them for repealing laws to which they are opposed or for passing measures which they advocate This exchange of support takes place because no group is strong enough to have its own way The result is that laws are passed not with a view to promoting the welfare of the nation as a whole but for the purpose of advancing the selfish and sordid interests of a group or party The evil of log rolling is spreading in Great Britain also it is bound to affect legislation in countries where government is carried on under a multiple-party system and where no single party is in a position to dictate, and in modern democracies which have to look after a variety of interests numerous parties are bound to grow and develop Evidently Dicey made his observations at a time when he had no clear conception of modern political and economic tendencies We cannot to-day do away with log rolling despite our best efforts and it is therefore difficult to reject proportional representation and deprive minorities of their due share of Parliamentary seats on this pretext which appears to us to be a false pretext

Moreover it is often argued that the system of proportional representation even when applied to the general elections is not and cannot be observed inside the legislature where generally decisions are taken by a simple majority no matter how the legislature has been constituted But this difficulty can be removed to some extent if in certain matters such as the fundamental rights of the people the legislature is prevented from amending or altering the laws incorporated in the constitution by a simple majority or by simple legislation a device which we have recommended for adoption in India in respect of certain constitutional provisions bearing on minorities protection The difficulty may be minimised also if it is provided that Committees of the Legislature which in modern times do a considerable amount of legislative work should be elected out of the entire Parliament proportionally to the numerical strength of the parties so that in the Committees as in the legislature the majority as well as the minority may be represented proportionally

The main argument however against proportional representation is that it paves the way of many minor political parties into the legislature and thus affects the stability of responsible govern

ment which relies on a strong majority in the legislature * But this is a defect which it will be difficult to eliminate in India in view of her peculiar conditions and circumstances

Different variants of the type

If minorities in India are to have adequate and fair representation in the legislatures, the only alternative to the system of proportional representation is perhaps the method of representation by separate electorates, a device we have rejected on the grounds extensively dealt with in the preceding chapter Proportional representation is, therefore, a method whose possibilities should be more fully explored in this country than has hitherto been the case The question is whether we should have proportional representation by means of the single transferable vote or proportional representation of a slightly different type The system of the single transferable vote is rather much too complicated for the average voter to understand and requires some amount of technical knowledge on the part of the party organisers, and the electorate in India being backward in education a different method might be tried for their benefit We think that the cumulative vote system which Low advocated in 1867 is much simpler and may effectively serve the purposes we have in view According to this system which is some sort of a proportional variant, in constituencies returning two or more members, each elector has a right to as many votes as there are members to be elected and may, if he so desires, give all his votes to one candidate of his choice or may distribute them The system of cumulative voting has been adopted for plural-member territorial constituenciencies under the Government of India Act of 1935 † The cumulative vote enables a numerically weak party by the concentration of its votes on its own candidate to secure representation At any rate a weak party cannot be routed entirely as is possible and generally happens in constituencies where the principle of the bare majority is observed

There is another method which has often been advocated with a view to giving minorities representation in the legislature.

* In France, by a law of 1919, the proportional system was applied with the result that no list of candidates for the electoral district obtained an absolute majority, but by a law enacted in 1927 she reverted to her previous system of the absolute majority vote in a single-member constituency

† Clause 15, Part I of the Provincial Assemblies Order, 1936

This is called the Limited vote * according to which each voter is allowed to cast his vote for a smaller number of candidates than the total to be elected in a constituency Take, for example, a constituency of six members In such a district each voter may vote, say only for four (i e , less than six) so that the majority, even if they vote solidly for the same candidates, cannot obtain more than four seats The minority obtain the other two seats This method is really an artificial limitation or standardisation of the majority principle

It ought to be remembered that these two systems do not always yield results exactly reflecting the numerical strength of the parties in constituencies because as a general rule the distribution of seats between the majority and the minority is controlled if not determined prior to election i e before the numerical strength of the parties as reflected in the elections is known According to the limited vote although as in the example given above two out of six seats are taken by the minority it is just possible that this minority may secure less than one third of the votes polled Again if the majority party is aware of its numerical strength it may instruct one part of its followers to vote for the reserved four candidates and the other part to concentrate its votes upon other candidates for the purpose of routing the minority party which it does not favour Under the cumulative vote system, it is possible that the minority instead of concentrating all its votes upon a single person may give orders to its followers to cast three votes for one list and three votes for another in a six member constituency and thus secure more than one seat provided of course that it had known its numerical strength before and that its calculations were correct

* In the election of office-bearers under certain public bodies or associations in India the Second Ballot is sometimes used By it a candidate is returned at the first election only if he has obtained an absolute majority of the valid votes recorded. If no candidate obtains such a majority a second election is held which is open only to the two candidates who in the first election secured the highest number of valid votes to the exclusion of the rest and the results are announced on the basis of the Second Ballot It eliminates the least popular of three or more candidates but it tends to increase greatly the election expenses and offer undesirable temptations to bargaining and intrigue The system is wasteful and inconvenient in large constituencies but may be adopted in constituencies in which the electorate is comparatively small

We prefer the cumulative system because it tends to strengthen the position of the minority. That system no less than the limited vote presupposes solidly organised parties and a knowledge on their part of the voting strength in their constituencies. There are reasons to believe that there would be no lack of such parties in India when she comes to have real taste of political power. The limited vote was introduced for municipal elections in Lausanne in 1872, in Spain in 1876 and in Italy in 1889. The cumulative vote was introduced in England for school-boards elections in 1870, and in the same year in Pennsylvania for municipal elections. In England it disappeared in 1902 with the school-boards themselves. Under it the minority repeatedly secured more than its proportional representation in elections to the House of Representatives in Illinois.

Proportional Representation and Separate Electorates compared and contrasted

It has been contended by advocates of the system of separate electorates that there is nothing to choose between it and the principle of proportional representation and that those who support proportional representation should have, and can have, no objection to separate electorates.* It is true that the object of separate electorates is to give minorities Parliamentary representation proportionate to their strength in the constituencies. It is also true that the object of proportional representation is the same. But there is a striking, and perhaps, a vital point of difference between the two systems. Separate electorates divide the community into permanent groups, the segregation of the groups from each other is real and complete. To give a concrete illustration, voters in a Mahomedan constituency in India cannot vote for a "general" candidate, nor can "general" electors vote for a Mahomedan. They are divided into water-tight electoral compartments. Proportional representation, on the contrary, gives a larger field of choice to the voters. They can vote for any candidate they like irrespective of his caste, creed or class or, if they so choose, they may solidly vote for a candidate belonging to

* See Dr Shaffat Ahmed Khan's notes on the *Report of the U P Committee* [on] *the Simon Commission*

their community A national outlook is not ruled out under proportional representation while it gives minorities an opportunity to secure representation proportionate to their numerical strength It is an elastic method and can be used both for national and party or group ends It does not, unlike separate electorates, necessarily and *ipso facto* disrupt and vivisect the nation

CHAPTER XVI

The Protection in Legislation and Administration

Protection in administration necessary

Minorities do not feel assured in regard to their position, status and rights, as different post-war States in Europe have proved, if only they are represented in the legislatures Those European countries have adopted, in addition to adult suffrage and proportional representation, various other devices with a view to safeguarding the rights of minorities They have sought to give members belonging to the minority communities an opportunity to co-operate actively and directly in the administration, provided for them educational facilities and guaranteed to them in a way equality of treatment in the use of their languages at least in primary education and admission to public employments In other words, there is protection in administration side by side with protection in legislation

The executive not only executes laws but makes them

We do not think it is unfair and unreasonable on the part of minorities in India, particularly the Muslims, to demand representation in the Cabinets, Central and Provincial, and in the public services For the composition of the executive is as important at least as that of the legislature It is wrong to suppose that the function of the executive is confined only to the process of applying the laws enacted by the legislature The executive not only carry out the laws but are generally in modern times entrusted with wide powers of delegated or subordinate legislation This is inevitable as there is an ever-growing pressure of public business in a modern legislature The legislature has not the time, perhaps not the capacity and experience either, to compile statutes so minutely detailed as to meet every situation or emergency that may arise It cannot be expected to deal adequately with such technical issues as emerge from day to day in the spheres of health, housing, agriculture, industry, manufactures, merchant shipping, control

and regulation of water ways transport wireless and local self government It 'is essential in these spheres, as Anson remarks, to have elasticity and power of change '* Many problems again may arise in course of time which it is impossible to bring within the purview of any foreseen Parliamentary solution and it is best to locate powers which can be used on occasion rather than merely to legislate *ex post facto* † The result, therefore is that the executive are given large and extensive powers under Acts of the legislature to deal with such problems in emergencies and the inevitability of such delegated legislation is practically taken for granted

Different forms of departmental legislation

There are different forms of this departmental legislation or executive law making Sometimes the legislature passes an Act expressing its purpose in general terms and leaving the mode of executing that intention to be settled by departmental rules and regulations Sometimes the department concerned is authorised to make orders having the force of law in regard to the subject-matter of the statute Sometimes again the department is empowered within limits to repeal or modify the express provisions of the Act conferring powers on the executive

The scope of such legislation.

As a general rule however, it was understood that delegation conferred (*i*) no power to legislate as to principles or tax and (*ii*) authorised no amendment of the Act permitting such delegation or any other Act But recent legislation indicates deliberate departure from these principles Reference may be made to the British Import Duties Act 1932 under which preferences or exemptions may be accorded by order of the Treasury on the recommendation of the Secretary of State in respect of Dominion and Indian products and manufactures the Juries Act 1922 empowering amendment by Order in Council the Mental Treatment Act 1930 authorising the Minister concerned to amend by Order and the Local Government (Scotland) Act, 1932 vesting in the Secretary of State large powers of change

* Anson *The Law and Custom of the Constitution* (edited by Keith) Part I p 240.
† *Ibid* pp 249 50

lations may also be amended or withdrawn by resolution The third method followed, as we have seen, in respect of the Indian Orders requires that the draft Order in Council shall be laid before both Houses of Parliament and made in the manner as indicated above This procedure is much more effective than the other two methods and gives the Lords and the Commons concurrent powers of control as contrasted with Bills in which the Lords under the Parliament Act of 1911 retain only the right to delay and not to veto legislation But apparently there is no safeguard even in this procedure during the summer recess from August to October when the Secretary of State may in the name of the King s Council lawfully legislate by Order in Council

Interference with judicial discretion.

A considerable part of delegated legislation lays down that the Order made shall have effect as if enacted in the Act a provision which has provoked much adverse comment But some measure of judicial control was asserted in *Yaffe s* case in which it was ruled that such phrase empowered the executive only to act in conformity with the Act and that it did not compel the courts to accept delegated legislation unless it conformed to the Act * In certain cases however power is conferred on the Minister concerned to confirm an Order and the confirmation shall be conclusive evidence that the requirements of this Act have been complied with and that the Order has been duly made and is within the powers of the Act † This clause constitutes an undue and very objectionable interference with the discretion of the Courts and is likely to produce conflicts between the executive and judicial organs of the State It has not been judicially tested but we have our serious doubts if the judiciary is competent to nullify such legislation having regard to the doctrine of Parliamentary omnipotence Three typical cases of judicial control may be cited In *O Brien s* case an attempt *ex post facto* to validate a regulation by Order in Council was frustrated in 1923 by the Court of Appeal ‡ In *Chester* v *Bateson* a regulation to the

* *Minister of Health* v *A Yaffe, Ex parte* (1931) A C 494

† *Cf* Small Holdings and Allotments Act 1908.

‡ A. C. 603 (1923)

effect that no proceedings could be taken for ejectment of Munitions workers without the assent of the relevant Minister was nullified.* Again in *Attorney-General* v *Wilts United Dairies* it was held that no regulation which sought in effect to impose a tax without Parliamentary authority was valid † But the exact scope of delegated legislation is not absolutely clear and there is room for conflicts of jurisdiction ‡

Delegated Legislation in United Kingdom

The nature, extent and significance of such legislation may be realised when one refers to its annual output in the United Kingdom which is enormously large During the year 1920 the total number of such departmental rules or orders was no less than 2473 The corresponding figure for the year 1927 was 1349 as against 43 Public General Acts, showing, however, a steady decline in delegated legislation after a stormy and anxious war period Out of these 43 Acts as many as 26 authorise the making of Orders-in-Council, rules, or regulations § It follows that the country is actually governed not by Parliament despite its historic omnipotence but by executive departments It may be that England illustrates a rather extreme case of such legislation, but there is no denying the fact that it is bound to assume an ever-increasing importance in every country in view of the complexities of modern problems of administration and expansion of the functions and activities of the Government in all parts of the civilised world || Even in the United States, where under a Federal constitution the Supreme Court enjoys wide powers of control, the validity of delegated legislation is not generally called in question merely on grounds of executive action

Representation in Cabinets

Hence it seems natural for minorities in India to insist on a fair share of representation in the Government of the country The questions which arise in connection with the personnel of the

* I K B, 829 (1920)

† 37 T L R 884, 38 T L R 781 (1921)

‡ For a critical survey of delegated or subordinate legislation, read *Law in the Making* by C K Allen, Chap VII, pp 290 356

§ Lord Hewart *The New Despotism*, pp 96 97

|| Compare the drastic provisions of the Bengal Suppression of Terrorist Outrages Rules, 1934, and the action taken by the Government of India to vary the Textile tariff schedule in 1936

Cabinets are (1) how minorities should be given representation therein, whether by statute or by convention, (2) whether there are precedents in favour of minorities representation in the Governments in Europe and other parts of the world, and (3) whether such representation does not tend to weaken the executive, impair its efficiency and affect prejudicially the doctrine of joint responsibility

Various parties approve of the principle of minorities representation.

While accepting the principle of minorities representation in the Central and Provincial Cabinets in India the Congress scheme proposed that the interests of minorities in this regard should be recognised by convention * The Minorities Pact stated that in the formation of Cabinets at the Centre and in the provinces as far as possible members belonging to the Muslim community and other minorities of considerable size should be included by convention † Dr M S Moonje who represented the Hindu Mahashabha was of opinion that the Congress formula in regard to the composition of the Cabinets should be amended so that conventions should be left to grow and develop as a result of political exigencies and that without interfering with the constitutional freedom of party leaders to choose their colleagues the principle might be recognised that minorities of considerable numbers should as far as possible be included in the Cabinets It is therefore clear that although there were differences of opinion in the matter of details there was practical unanimity on the point that minorities should be represented in the Cabinets wherever and whenever possible It is also clear that none of these bodies was in favour of statutory provisions in that regard

Convention is an elastic procedure.

It is perfectly true that conventions will to some extent interfere with the constitutional right of party leaders to nominate their colleagues But circumstanced as we are we shall have to permit of such conventions in the interests of amity and goodwill between different sections of the community Conventions are more elastic than statutory provisions and can

* Clause 5 of the Congress Scheme.
† Clause 7 of the Minorities Pact.

therefore be adapted with greater ease to the special needs and circumstances as they may arise.

The principle already in operation in India

Something like convention was observed in the formation of Ministries and of Executive Councils in the Indian Provinces and of the Executive Council of the Governor-General under the Montagu-Chelmsford Reforms There was absolutely no statutory recognition of the principle of communal representation in the Cabinets * But it was the usual practice with Governors to take the claims of the largest minority, namely, the Moslems or the Hindus, into consideration while appointing their Ministers Like considerations applied as a general rule in the case of appointments to the Executive Councils of the Governors and the Governor-General The experience of sixteen years' working of the Act shows that Ministers generally worked as a team, though not strictly on the doctrine of joint responsibility There might have been conflicts in the inner Councils of the executive, but those conflicts perhaps arose between one half of the Government and the other and not generally between Ministers on communal grounds

In the Congress Cabinet also important minorities are fairly represented The ratio of representation may vary from year to year, but the fundamental principle of minorities representation is scrupulously observed There is no evidence to show that there are dissensions in the Congress Cabinet on communal grounds; on the contrary, it is well-known that it preserves its essential unity and accepts the leadership of its chief Communal considerations are subordinated to the broader and larger requirements of the nation It is, therefore, wrong to think that serious difficulties will arise in the future government of the country should party leaders evolve conventions in this respect without prejudice to the basic foundations of responsible government We are, however, opposed to a statutory provision for minorities representation in the Cabinets for the obvious reason that it will unduly tie the hands of party leaders That consideration evidently weighed with Parliament when it enacted the Government of

* S 52 of the Government of India Act, 1919

India Act, 1919 and the Government of India Act, 1935, and has throughout guided also the policy of the Congress

Foreign precedents

Coming to foreign precedents in this regard, we have seen that the principle of minorities representation is observed in Switzerland, where the Federal Executive Council and also the Cantonal Councils are composed of representatives of the principal communities * and in most of the post war European democracies We have referred at some length to the late President Masaryk s observation† to the effect that in a democracy it is obviously the right of every party to share in the administration of the State as soon as it recognises the policy of the State and the State itself We have also quoted Professor Keith s opinion regarding the actual position in the Dominion of Canada in this respect ‡ *Apropos* of that Dominion Professor Kennedy points out that local usages have grown up in relation to offices of Speaker and Deputy Speaker It is practically a working principle that when a political party holds office during several Parliaments if the Speaker in one Parliament is of British origin the next one shall be a French Canadian § a sort of convention (not a legal obligation) such as has been followed in the election of Mayor and Deputy Mayor of the Calcutta Corporation since its reconstruction under the Banerjea Municipal Act of 1923 Professor Kennedy adds that by a regulation of the House the Speaker and the Deputy Speaker cannot be of the same race and that indeed appointments to all offices great and small, both in the Senate and in the House of Commons are made as a rule in relation to racial differences ‖ In Germany under the Weimar constitution the Chancellor could not form his Cabinet exclusively with men of his party Everything depended on the possibility of an agreement being reached by a number of parties commanding a majority in the Reichstag As a general rule observes Mr

* Chap VIII *supra*.
† Chap IV *supra*
‡ Chap. IX, *supra*.
§ W P M Kennedy: *The Constitution of Canada* p 389
‖ *Ibid*, pp. 389-90

Headlam-Morley,* 'the different parties taking part in the Government are represented in the Cabinet in definite numbers according to their proportional strength in the Reichstag" Party leaders met and bargained till it was decided which parties should take part in the Government † Practically the same procedure is followed *mutatis mutandis* in Poland, Yugo-Slavia, Czecho-Slovakia and in the Baltic States

The British Cabinet under modern conditions

Is not such a policy, it is asked, calculated to weaken the foundations of responsible government and impair its efficiency? Scholars enamoured of the British Cabinet system cannot tolerate any other variant of responsible government The three chief features of the British system are (1) its essential unity, (2) joint responsibility, and (3) the unswerving allegiance of the Cabinet members to the Prime Minister The smooth working of such a system depends fundamentally on the existence of two large parties The Government can then rely on a substantial majority in the legislature, if defeated, the Opposition is ready to step into their shoes It will be seen that with the emergence of the Labour party the Cabinet system in the United Kingdom is trying to adapt itself to new environments The National Government constituted in 1931 had gone so far as to allow the members of the Cabinet to speak against each other, and thus the essential unity was not being preserved

It is true that the unity of the British Cabinet was soon restored to a large extent as the result of resignations of Sir Herbert Samuel and few others But the unity was really on the surface, there were deep undercurrents running in a contrary course The conditions which made the Cabinet system a success in the United Kingdom in the nineteenth century are disappearing The success of the British Cabinet system may be attributed, as Professor Laski points out, to two principal causes First, the period of its consolidation was marked by remarkable industrial development and economic expansion The standard of life was raised for every class and the volume of trade increased enormously Accordingly, the system became associated in popu-

* Headlam Morley *The New Democratic Constitutions of Europe*, p 236
† There has been some drastic change under the Nazi dictatorship

lar minds with outstanding material progress There was no suspicion regarding the activities of the Government There was no mistrust as to their capacity They were anxiously looked forward to for lead and guidance in every form of public endeavour Secondly—and this perhaps is the more important cause—not only were there two main parties in Parliament but that these two parties were agreed about the fundamentals of political action There was hardly any measure put on the statute book by one Government which could not have been put there by the Opposition *

Emergence of new forces

If the Liberal party introduced the Reforms Act of 1832 the Tories were responsible for that of 1867 and the Act of 1884 was based on both Neither in foreign nor in imperial policy was there any difference between the parties of any fundamental importance Over the problem of Dominion Home Rule for Ireland the distinction between the parties was one of degree rather than of kind Similarly in respect of India the difference between a Liberal and a Tory was similar to that between tweedledum and tweedledee But is not that state of things changing very rapidly? The rise of Fabian Socialism the emergence of the Independent Labour Party and new demands made by the working classes seem to point to the end of the period of compromise These have begun to challenge the foundations of capitalist society Between a capitalist regime observes Professor Laski which sought to preserve the motive of private profit as the key stone of the arch and did not propose to allow the essential sources of the economic power to pass from private ownership and a Socialist regime which denied the validity of either premise it did not appear that there was the possibility of a new compromise †

In such perspective it is inevitable that changes of government would mean a constitutional revolution and there is no doubt that in future the English political system would be subjected to a severe strain The constitutional crisis of 1931 in the

* Lord Balfour was once led to remark thus Our alternating Cabinets though belonging to different parties have never differed about the foundations of Society And it is evident that our whole political machinery presupposes a people so fundamentally at one that they can afford to bicker (Laski : *Crisis and the Constitution* pp 49-50)

† Laski : *Democracy in Crisis* p 40

United Kingdom has shown that persons who had been life-long opponents in trivial matters and small issues have now made a common cause in large ones. The result is that the Liberals and the Conservatives are being driven into an alliance while the Labour Party is moving with equal fervour in the opposite direction. It is now being increasingly felt that compromise is impossible when social, political and economic standpoints of the parties are fundamentally different. In these circumstances it is difficult to predict that the principles and traditions of the British Cabinet system would be preserved in all their pristine vigour.*

The effect of proportional representation

Besides, the old British system cannot smoothly work under adult suffrage with proportional representation. As we have already supported the principles of adult suffrage and proportional representation for India, the British pattern of responsible government has to be varied to suit our special needs and circumstances. The British system is not the last word in the practical art of constitutional government. The Britishers themselves proved it during the War and again in 1931.† The political mind must be receptive to new ideas or new relations of old ideas. It cannot remain static without stultifying itself.

The Collegiate system works better than the Cabinet system in certain countries

It may be that great difficulties are being experienced by modern States in Europe to stabilise their Governments, but they seem to us to be the difficulties of a formative period. It is just possible, however, that the collegiate system in which the Prime Minister is only a *primus inter pares* will prove in those countries a more effective form of government than the Cabinet system in which the Prime Minister is the dominant figure. The British Prime Minister, in relation to his colleagues in the Cabinet, has often been described by the phrase *primus inter pares*, that is to

* For an interesting account of this tendency read Laski: *Democracy in Crisis*, and *The Constitution and the Crisis*.

† There are records to show that even in the nineteenth century British administrations were carried on without a majority in Parliament, *e.g.*, Lord Melbourne's Government after 1834, Lord John Russell's in 1846, Disraeli's First Ministry and Gladstone's Administration after the First Home Rule controversy.

say, he is only one of a group fundamentally on a footing with the others, if only the first among equals Sir William Harcourt's phrase for the Prime Minister was *inter stellas luna minores* Mr Ramsay Muir asserts, however that the term *primus inter pares* is nonsense, as applied to a potentate who appoints and can dismiss his colleagues He (the Prime Minister) is in fact, though not in law, the working head of the State endowed with such a plentitude of power as no other constitutional ruler in the world possesses not even the President of the United States *

It is the Prime Minister's right under the British system to dissolve the Cabinet by his own resignation but as Professor Keith points out † by resigning he loses power to advise a dissolution of Parliament It is however, wrong to think that the Prime Minister is helpless he may persuade the Crown not only to accept his resignation but to give him a fresh commission to form a new Cabinet which may advise dissolution Professor Keith cites for instance the case of Premier Lang of New South Wales who was in a minority in his own Cabinet ‡ Mr Ramsay MacDonald followed the same policy when he compelled the resignation of some of his Labour colleagues and formed the National Government What perhaps was constitutionally improper on his part was not the construction of a National Government and elimination of his Labour colleagues from the Cabinet but his failure to advise the King to dissolve Parliament on that issue But so far as the dissolution of Parliament is concerned the right of advising the King in that behalf belongs to the Cabinet and not to the Prime Minister alone and this view was shared by no less a distinguished statesman than Mr Asquith (afterwards Earl of Oxford and Asquith)

The position in India.

In countries like India which contain large religious racial or linguistic minorities it is the British Cabinet system in its old setting which may prove a failure and not the Collegiate system as

* Muir *How Britain is Governed* p 83.

† Keith *The King and the Imperial Crown* pp. 176-77

‡ Keith *Responsible Government in the Dominions* Vol. I p xvii.

such, for the Government cannot and will not face the problems of administration courageously if large sections of the people do not support and sympathise with them And the support and sympathy of minorities cannot be enlisted on behalf of the Government unless at least the most important of them have effective representation in it But every attempt should nevertheless be made in India to ensure collective Ministerial responsibility and continuity of policy The problem is not free from difficulty Again the Departments of the Government should, as far as possible, be co-ordinated as is done in England by a Cabinet Secretariat Much, however, will depend in the preliminary stages on the wisdom and tact of the Governor-General or the Governor In this country it would be introducing no novel principle should important minorities be given representation in the administration by convention because already, as we have stated, the Government as well as the Congress are working in accordance with that principle It is well that His Majesty has indicated in his Instrument of Instructions issued to the Governor the procedure according to which the Governor should select his Ministers regard being had to the interests of important minorities instead of Parliament having sought to provide by statute for minorities representation in the Council of Ministers *

The provisions† of the Government of India Act, 1935, are, however, rather much too elastic and leave enormous powers of discretion in the hands of the Governor It is wrong to think that‡ by the Government of India Act or the Act of 1935 Ministers held or hold office " at the pleasure of the legislatures " concerned. Both the Acts provide that the Ministers shall hold office at the

* " In making appointments to his Council of Ministers our Governor shall use his best endeavours to select his Ministers in the following manner, that is to say, to appoint in consultation with the person who, in his judgment, is most likely to command a stable majority in the legislature, those persons (including so far as practicable members of important minority communities) who will best be in a position collectively to command the confidence of the legislature But in so acting he shall bear constantly in mind the need for fostering a sense of joint responsibility among his Ministers " (Paragraph VIII of the Instrument of Instructions to the Governor)

† Ss 10 and 51

‡ That erroneous view has been expressed in Dr S C Bagchi's latest edition (1936) of Cowell's *History and Constitution of the Courts and Legislative Authorities in India* at p 108

pleasure of His Majesty's representatives,* and indeed in the whole British Empire save in the Irish Free State† the authority in law in that behalf is the King or his representative as the case may be. A striking point of difference between the two Acts lies in the fact that under the old Act now repealed the office of Minister was not open, except for a limited period of six months, to any person but an elected member of the legislature,‡ while under the latter Act it is open to the Governor to appoint Ministers from among the nominated members of the Second Chamber. This read with the provisions with respect to the choosing and summoning and dismissal of Ministers detracts to some extent from Ministerial responsibility to the legislature. The Governor's Instrument of Instructions however seeks to provide some check on the discretionary powers of the appointing authority. There is no cause for apprehension that the interests of important minorities will not be taken into consideration while appointments are made to Ministerial offices although the doctrine of collective responsibility may receive a setback.

In this connection reference may be made to the controversy that has been provoked as a result of the non-inclusion of a single Mahomedan in the Orissa Congress Ministry. The position is unfortunate but it may be urged in defence of the Congress party that they were anxious to provide for the Mahomedan com

* The provisions of the Act should not be construed too strictly. It is not to be supposed that the right to dismiss Ministers is to be exercised by the Governor or the Governor-General as the case may be save in emergencies. The Act read with the Instrument of Instructions contemplates Ministerial responsibility to the legislature subject to reservations contained therein. In this view refusal by the Assam Ministry to resign or advise dissolution despite a series of defeats sustained by them in the Assembly on important Opposition motions rejecting in part or in whole demands for grants introduced by them on the recommendation of the Governor in the Budget session in August 1937 was a challenge to the basic structure of the Act. The verdict of the House could in no sense be attributed to what is known as a snap vote. It was deliberate and decisive. Nor was it possible to attempt to secure a reversal of the verdict by the Upper House for that House has no power to vote on demands for grants. In the absence of Ministerial resignation or dissolution of the Chamber the Governor should have dismissed the Ministers and explored the possibilities of an alternative Ministry. The whole episode was deplorable. The reconstruction of the Cabinet under the same Premier in February 1938 is a step which in the circumstances does not seem to be in accord with the accepted principles of constitutional propriety.

† Arts 53-56.

‡ s 52 of the 1919 Act

munity a seat in the Cabinet provided the person concerned agreed to accept the Congress policy and programme What is important to note is that unity of purpose and a sense of joint responsibility must as far as practicable be maintained in the Cabinet and that the Governor, as Sir John Hubback made it clear, is under no obligation to provide for communal representation in the Cabinet in all circumstances* Nor can he override the advice of his Premier in such a matter without exposing the constitution to grave risks

The status and powers of Premier

This brings us to the question of Premier in a Governor's Province His importance, position and power in a Cabinet system of government are exceptional In 1931 in the United Kingdom Mr Ramsay MacDonald forced the resignation of his Labour colleagues in the Cabinet and formed a National Government with Mr Baldwin as the Lord President of the Council and a Conservative majority in the Commons Constitutional purists have protested against Mr MacDonald's action on grounds of constitutional ethics, but if the Prime Minister can persuade the Crown to agree with him, the dismissal of his colleagues becomes easy and is regular The question arises, will " Premiers " in Indian provinces enjoy such powers, and, if so, what is likely to be their effect on the position of representatives of minorities, if any, in the Cabinet? The India Act of 1935 makes no mention of "Prime Minister," or "Premier" or " Chief Minister " with reference either to the Federation or to the provinces suggesting at first sight a Collegiate rather than a Cabinet form of government But the Instrument of Instructions issued to the Governor (para VIII) clearly postulates (*i*) a leader, (*ii*) consultation with him in the appointment of other Ministers including, where practicable, representatives of important minority communities, (*iii*) securing of confidence of the legislature by Ministers so appointed, and (*iv*) fostering of a sense of joint responsibility among Ministers The new constitution, therefore, contemplates Prime Ministers or Premiers or Chief Ministers at the Federal Centre and in the provinces

* Read Paragraph VIII of the Instrument of Instructions

It may be noted that a Prime Minister, though unknown to English law, as Anson has put it,* is a necessary part of English constitutional conventions The title of Prime Minister was practically unknown in England until the beginning of the eighteenth century Clarendon was described as the Great Minister of State, Buckingham as the Principal Minister of State, and Danby as the Chief Minister Harley was repeatedly spoken of as First Minister or Chief Minister and perhaps the term Prime Minister was for the first time used by Swift in his *History of the Last Four Years of Queen Anne* But there is nothing to show that those Ministers by whatever name they might have been called, had the amplitude of powers which have come to be possessed by modern Prime Ministers The nearest approach was Walpole who however failed to assert the right to nominate his colleagues for the formal approval of the Sovereign or to bring all his colleagues under his control But Pitt it appears reaped for seventeen years from 1784 to 1801 where Walpole had sowed with so much zeal Except in the *Chequers Estate Act* 1917 the term Prime Minister does not find place in any Act of Parliament or in the records of the Houses of Parliament In the Treaty of Berlin Lord Beaconsfield signed his name as Prime Minister of England and in 1905 King Edward by Sign Mannual Warrant gave precedence to the Prime Minister next to the Archbishop of York

The Premier unknown to law?

The India Act of 1935 as we have seen does not rule out the idea of a Prime Minister at the Centre or in each of the Governors Provinces and conventions in that regard may be evolved under the Instrument of Instructions although the communally constituted legislatures under the Act are likely to produce Collegiate rather than Cabinet bias In England the Prime Minister is also known as the Premier and both the terms are identical In the Irish Free State where responsible government was deliberately enacted as law there was no Prime Minister or Premier but the President of the Council

* *The Law and Custom of the Constitution* (edited by Keith) Part I p 130

who played the part of the leader of the Cabinet subject to the restrictions contained in the Constitution Act * In the Canadian Provinces and Australian States Chief Ministers are by custom called Premiers while in the Dominion and the Commonwealth they are Prime Ministers We may in India evolve Dominion practice in this respect giving Premiers to the Provinces and Prime Ministers to the Federation, but there is no binding rule under the Act or the Instructions so far issued †

I Representation in the Services

Open competition and security of tenure essential

Can the principle of minorities representation be applied in appointments to Public Services to the same extent and in the same manner as may be applied to the composition of the Cabinets? Every Government is dependent upon the quality of its public officials "Administration is of its essence," as Professor Laski ‡ remarks, and it is necessary that those who execute law should hold its virtues in their keeping How should public servants be appointed? Should they be given a permanent tenure and removed from all political influences? Or should their tenure be made to depend upon the will or direction of the Government for the time being in power? It is generally admitted that in the interests of efficiency of the services and the welfare of the State the political executive should have the least control over the appointment of public servants The Civil Service §

* Drastic amendments to the Constitution have been effected by a measure sponsored by Mr de Valera The changes became law in December, 1937 The President will occupy a position different from what Mr de Valera originally held but analogous to that of the Governor-General with all the powers originally vested in him by law as the President In the Governor-General's case the powers were more or less formal while in the President's case they are intended to be real *Eire*, a Gaelic name for Ireland, has been substituted for the Irish Free State The problem of minorities protection is bound to raise difficult and complicated issues if, as is clear, an attempt is made to bring Ulster within the jurisdiction of *Eire*

† In C P and Bihar the leader of the Cabinet has been officially designated as " Prime Minister " while in other provinces the term generally used is " Chief Minister "

‡ Laski *A Grammar of Politics*, p 397

§ Formerly the British Foreign Office appointments were exceptions to this rule John Bright once called the Office the " outdoor relief department of the English aristocracy "

in Great Britain is one of the most efficient and gifted services in the world, and the reason for this is that permanent officials are appointed under rules which have reduced to a minimum the possibilities of personal favouritism They are practically appointed by an agency in no way identified with the Cabinet or the political parties These rules are also generally followed in making appointments to the Indian Civil Service

We say generally followed because a certain proportion of the vacancies is filled to secure representation of minorities and further because the nomination system has been substituted for the competitive test in regard to British recruits The British system was until recently mainly based on the principle of open competition Examination is of course no absolute test of a person s efficiency There are instances to show that men have done well in life without having done well in examination and that men with brilliant school or university records to their credit have miserably failed in life Academic efficiency is no sure test of one s capacity for professions or services Nor are the examination results a proper and accurate index in all cases of the quality of the answer papers But examination is insisted on because no better test has yet been devised and because one s record at school or university offers some guide as to one s general efficiency Questions which arise in connection with public employments in India are Is it necessary that minorities should be given representation in the services? Is it possible to secure such representation by the test of an open competition? If not, what device or devices may be adopted to maintain an efficient service having regard to the legitimate claims of minorities?

Various schemes proposed.

The Congress scheme laid down that appointments should be made by non party Public Services Commissions which would prescribe the minimum qualifications and which would have due regard to the efficiency of public services as well as to the principle of equal opportunity to all communities for a fair share in those services under the Crown in India * The Minorities Pact stated† that in every province and in connection with the Central Government a Public Services Commission should be appointed

Clause 4 of the Congress Scheme † Clause 10 of the Minorities Pact.

and recruitment to the public services, except the proportion, if any reserved, to be filled by nomination by the Governor-General or the Governors, should be made through such Commission in such a way as to secure a fair representation to the various communities consistently with the considerations of efficiency and the possession of necessary qualifications It added that direction to the Governor-General or the Governors should be embodied in the Instrument of Instructions with regard to recruitment to give effect to this principle and, for that purpose, to review periodically the composition of the services Dr Moonje suggested modification of the relevant clause in the Congress scheme in the following manner,* namely, (*a*) that no person should be under any difficulty for admission to any branch of public services merely by reason of his religion or caste, (*b*) that in every Province and in connection with the Central Government, a Public Services Commission should be appointed and recruitment to public services should be made by such a Commission on considerations of highest efficiency and qualification available for any particular service, thereby securing the two-fold object of maintaining the services on a high level of efficiency and leaving open a fair field for competition to all communities to secure fair representation, and (*c*) that membership of any community, caste or creed should not prejudice any person for purposes of recruitment, or be a ground for promotion or supersession in any Public Service

Parties agree on certain principles

All these three schemes were agreed on the question of the appointment of the Public Services Commission, the Congress scheme specially emphasising that the Commission must be appointed on a non-party basis They were also agreed that the services must be as efficient as possible and that recruitment must be made through open competition and that no disabilities should be imposed on any community, caste or creed in regard to admission to public employments But the Congress scheme seemed to have suggested recognition of the principle of preferential treatment to minorities when it proposed that the Services Commissions should prescribe "minimum" qualifications Dr Moonje was op-

* Clause 4 of Dr Moonje's Memorandum

posed to that principle, for he said that minimum qualifications will not make for efficiency The principle of preferential treatment was also emphasised in the Minorities Pact which insisted on fair representation of the minorities in public services regard being had to the considerations of efficiency It went further and was prepared to concede the point that a certain proportion of the vacancies should be filled by nomination by the Governor General or Governors

Dr Moonje s scheme can not secure fair representation for minorities

In the present circumstances in India it is difficult, if not impossible to secure fair representation of minorities in the services should Dr Moonje s test be accepted The results of public services and University examinations prove it and it will be years before members belonging to the minority communities will be able to stand the test of open and free competition with those of the majority community in the country as a whole namely the Hindus It is no reproach to minorities circumstances have conspired against them The principle of minorities representation in the services has not been accepted in the European Minorities Treaties All that they have insisted on is that no one should suffer from disabilities in respect of admission to public services on account of their race religion or language But attempts have been made to associate minorities with the public administration in various countries President Masaryk* has given a picture of the position in Czecho-Slovakia † In Hungary the Government bound themselves according to a decree issued in 1919 to see that judicial and administrative posts especially those of sub-prefects were filled wherever possible by persons belonging to racial minorities ‡ In Ruthenia which has been granted under the Treaty a considerable measure of administrative autonomy under the Czecho-Slovakian State it is stipulated that public offices should be filled as far as possible by the inhabitants of that territory § Whatever might however be the specific measures taken in certain

* Chap IV *supra*.

† Protests have recently been made to the effect that minorities are not fairly treated in that Succession State.

‡ Chap IV *supra*

§ *Ibid*

countries to meet their special circumstances, the general principle followed in all the post-war European States was one of equality of treatment and not one of discrimination to the prejudice or in favour of any section of the community

Preferential treatment for minorities necessary

We think that in India some kind of preferential treatment in favour of minorities is necessary at least as a temporary measure It is necessary because principal minorities are so educationally backward that they cannot possibly face open competition with any reasonable hope of success Here the European analogy does not hold good in every detail In post-war European States minorities are as much cultured and advanced as majorities, if not more so in certain cases Besides, the minorities of to-day were the actual rulers of their countries in pre-war Europe, for instance, the transferred German minority in Poland or in Czecho-Slovakia So only a provision against discrimination to their prejudice constitutes a sufficient guarantee that they will have an adequate share in the administration Such, however, is not the case in India Unless some preference is shown to the minorities here they will have little chance in getting admission to the services, and hence the necessity of prescribing a minimum standard of efficiency which the Congress scheme suggested and the Minorities Pact took care to emphasise But the minimum test must be such as may not tend to impair the efficiency of the services or undermine their *morale* The principle of preferential treatment in favour of minorities has long been followed in India* in filling administrative and judicial posts without doing any palpable injury to the efficiency and integrity of the services We are definitely of opinion that that principle should be maintained so long as present circumstances continue to exist

The Government of India Rules and their possible effect

It does not, however, mean that the actual method adopted by the Government in enforcing it is in every detail just and fair and calculated to maintain the efficiency of the services and promote the interests of the State

* Council of State Debates, 1923, Vol V, p 416, Lord Irwin's Calcutta speech in December, 1926, and Sir Harry Haig's reply to the questions put in the Assembly in August, 1933, on the subject by Mr Gaya Prasad Singh

It is, for instance difficult to accord unqualified approval to their scheme in that behalf outlined in a resolution of the Government of India issued in July, 1934, with the concurrence of the Secretary of State The resolution came as a result of an undertaking given by the Government to review the results of the policy, followed since 1925 of reserving a certain percentage of direct appointments to public services for redress of communal inequalities * The rules framed relate to direct recruitment and also to promotion which perhaps will continue to be determined solely by merit They apply to the Indian Civil Service, the Central Services (Class I and Class II) and Subordinate Services under the administrative control of the Central Government, with the exception of those services for which high technical qualifications are required

The rules lay down that twenty five per cent of all vacancies to be filled by direct recruitment of Indians will be reserved for Moslems and eight and one-third per cent for other minority communities Should Moslems and other minorities fail to secure less than their prescribed percentages in open competition those percentages will be allocated to them by means of nomination If however Moslems obtain more than their reserved percentage in open competition no reduction will be made in the percentage reserved for other minorities If again other minorities are fortunate in securing more than their prescribed percentage the position of the Moslem community should not be disturbed The result is that the Hindus being in the majority in the country will have to suffer in either case The injustice to the caste Hindus is aggravated by clause 6 of the rules which provides that in order to ensure fair representation of the depressed classes duly qualified members of those classes may be nominated by the Govern

* Replies received from the various Port Trusts in India namely the Chittagong Port Trust Vizagapattam Trust Calcutta Port Trust Bombay Port Trust and Karachi Port Trust to the circular letter issued by the Government of India regarding representation of Moslems and other minority communities in Port Trust Services and laid on the table in the Central Assembly in September 1938 are revealing While agreeing to consider the legitimate claims of the minorities concerned the Trusts object to the proposal to accept a hard and fast rule in the matter and generally refuse to bind themselves in any way to recruitment on a communal basis. It should be noted that the Trusts are mostly under European control.

ment, even though recruitment to the service in question is made through competition, and that members of those classes, if appointed by nomination, will not count against the reserved percentages These provisions taken together are likely to render recruitment to public appointments by open competition a farce and oust the caste Hindus from the services for all practical purposes or at any rate deprive them of the representation in those services to which they are entitled by education, general efficiency and their contributions to the State

"The minimum standard" a vague phrase?

We recognise that the caste Hindus should be prepared to make some sacrifice, but then it must be kept within tolerable dimensions and be not punitive The Government have expressed their anxiety to take steps "to prevent in the new conditions anything in the nature of rapid displacement of Anglo-Indians from their existing position which might occasion violent dislocation of the economic structure of the community"[*] Some such consideration should have been given to "the existing position" of the caste Hindus and "the economic structure" of that community which might be "violently" dislocated under "the new conditions" The grounds which have repeatedly been adduced in defence of the policy of maintaining in superior services a certain proportion of British personnel specially apply in the case of recruitment of qualified caste Hindus to public services, and we are afraid that the rules do not supply that necessary protection The redeeming clause in the rules, however, is that which provides (clause 5) that

* Read in this connection the provisions in sub-sections (2) and (3) of Sec 242 of the Government of India Act, 1935, which lay down with reference to rules regulating recruitment to posts in Railways, and the Customs, Postal and Telegraph Departments that the appointing authorities in such case "shall have due regard to the past association of the Anglo-Indian community with the said services, and particularly to the specific class, character and numerical percentages of the posts previously held in the said services by members of the said community and to the remuneration attaching to such posts" Sub section (2) which applies to Railways Services contains a rider that effect must be given to any instructions that may be issued by the Governor General for the purpose of securing for each community in India a fair representation in the Federal Railways Services A similar safeguard should have been inserted also in sub section (3) which relates to services under the Customs, Postal and Telegraph Departments If it is a deliberate omission, it is difficult to explain it At present the Anglo-Indians hold 8 per cent of the posts under the Railways

in all cases the minimum standard of qualification will be imposed and that reservations are subject to that condition But the minimum standard of qualification is rather a vague phrase and may vary from time to time or from one appointing authority to another and in the interests of the efficiency and integrity of the services which must be protected by all means the standard of minimum qualification should be determined not by the Government or any *caucus* under the influence of party politicians or advocates of communalism but by non party Public Services Commissions similar to those existing in the United Kingdom The rules do not evidently contemplate any such procedure and so long as it is not provided, the necessary corrective to inequalities and iniquities will be lacking

Public Service Commissions and provisions relating thereto

It is interesting to examine the role that the Public Service Commissions Federal and Provincial contemplated in Sec 264 of the 1935 Act are intended to play in the recruitment and discipline of the services and also their composition personnel, detachment from political influence and other relevant matters There shall be a Public Service Commission for the Federation and a Public Service Commission for each constituent province provided that two or more provinces may agree that there shall be one *Public Service Commission for that group of units or that* the Public Service Commission for one of the provinces shall serve the needs of all the provinces It is further laid down that the Federal Commission if requested to do so by the Governor of a province may with the approval of the Governor General agree to serve all or any of the needs of the province * Advantage may be taken (and has already been taken in certain cases) of these provisions by the newly created provinces or any deficit province The Chairmen and members of the Commissions will be appointed by the Governor General for the Federation and by the Governors for their respective provinces acting in their discretion † At least one-half of the members of each Commission must be persons who at the date of their appointments have held office under the Crown for at least ten years ‡

* s. 264 (3) † s. 266 (1)

‡ Proviso to sub-section (1) of s. 265

Persons contemplated in the section are permanent service men, or non-permanent service holders such as Federal Court and High Court Judges and members of the Governor-General or the Governors' Executive Councils, retired or still in service It is not clear whether ten years' service means ten years' continuous service, or whether Ministers, who have held office for at least ten years, would be eligible for appointment under this reserved half

Of course Ministers are not for certain purposes "officials" in terms of the Government of India Act* or of the Act of 1935,† but it cannot be denied that for other purposes they hold office even though as a Council to aid and advise Assuming further that ten years' service is intended to be ten years' continuous service, a Minister may be found who satisfies that test It is a recognised principle in English constitutional law that Ministers hold their offices until they formally surrender them in the appropriate mode so that, if and when asked to continue in office in their old posts, they merely accept the request without formal re-appointment of any kind whatsoever,‡ and reliance may be placed on that English practice in counting the years of a Minister's service or in determining the question of continuity One cannot therefore say with any thing like confidence that Ministers are excluded from the reserved half, but the intention of the provision being effective protection of the " service " interests it may be presumed that it was not the desire of the framers of the Act to include Ministers in the reserved category

Commissions only advisory bodies

It must, however, be admitted that there is heavy weightage in favour of the services, and, with the Chairman as one of them, they will have a majority in each Public Service Commission, a position which cannot commend itself to public opinion The Governor-General or the Governor, as the case may be, is authorised to make regulations in his discretion determining the number of members of the Commission, their tenure of office and their conditions of service and also the strength of the Commission's staff and their

* s 134 (5), proviso to s 80B, and the Second Schedule

† s 69 (4)

‡ Keith *The Governments of the British Empire, Introduction*, p x.

conditions of service * These provisions will tend to some extent to detract from the independence of the Commission, but sub section (3) introduces salutary restrictions as regards the eligibility of the Chairman and other members for other appointments under the Crown in India It marks a welcome departure from the principle so frequently followed in this country in appointing High Court Judges to Executive Councils The powers conferred on the Commissions are somewhat vague and not adequate Reservation is provided in respect of the Secretary of State, the Governor General and the Governors services so that regulations may be made by them specifying the matters on which either generally or in any particular class of cases or in any particular circumstances it shall not be necessary for a Public Service Commission to be consulted † The Commissions are advisory or consultative bodies

Safeguards absurd.

Nor are all public appointments to be made on the results of examinations conducted by them Even non qualified candidates may be appointed Consultation with the Commissions is barred‡ as respects the manner in which appointments and posts are to be allocated as between different communities in the Federation or in the constituent units and also in the case of the subordinate ranks§ of the various police forces in India in regard to any of the matters set out in paragraphs (a) (b) and (c) of sub-section (3) of the section These safeguards for the subordinate police which seem to be panicky and strike at the roots of responsible government are in accord with the provisions of Section 243 of the Act which lays down that the conditions of the police forces in India of such ranks shall be such as are determined by the Police Acts Federal or Provincial legislation affecting those

* s. 265 (2) (a) (b)

† s. 266 (3)

‡ s. 266 (4)

§ In Committee debates in Parliament it was suggested that by subordinate ranks were meant grades below those of Police Inspectors and Sergeants. But according to Schedule I to the Government of India (Adaptation of Indian Laws) Order 1937 concerning the Police Act 1861 (V of 1861) references to the subordinate ranks of a Police force should be construed as references to members of that force below the rank of Deputy Superintendent.

Acts is ousted by specific statutory enactment save with the previous sanction of the Governor-General or the Governor, as the case may be, acting in his discretion.* This provision, unless considerably relaxed in actual operation, is bound to provoke conflicts between the Ministers and the relevant Governor or the Governor-General or between the Provincial Governments and the Governor-General. Both Ministerial responsibility in the provinces and Provincial autonomy in the Federal scheme are, therefore, likely to be undermined.

The Commissions provided for in the Act cannot improve matters in any appreciable measure. Too much is given to the Governor-General or the Governor and too little to the Commissions, and the avowed purpose of the Act is to divest Ministers and Service Commissions of any responsibility in these matters and to leave extraordinary powers of discretion in the hands of the Governor-General and of the Governors.† It imposes on the latter a measure of responsibility which in ordinary circumstances will prove rather embarrassing and in extraordinary situations may be much too burdensome. In actual practice it will be extremely difficult for them to negotiate these matters smoothly in the face of a powerful and competent Ministry. The only justification for these provisions may be sought in the difficult position of minorities and the anxiety of the authors of the Act to reassure them in the new scheme of responsible administration. Constitutionally they are absurd safeguards.

Appointments to the judiciary

Appointments to the offices of District Judges as defined in sub-section (3) of Sec. 254 are to be made by the Governor in his individual judgment‡ which means that the Governor will consult his Ministers when appointments are made but that his decision will be final and conclusive. Recommendation for such appointments must precede consultation with the High Court and not with the Public Service Commission and is presumably to proceed from the Ministry to the Governor. Matters relating to posting and pro-

* s. 108 (1) (d) and (2) (ii)
† s. 108
‡ s. 254 (1).

motion are also left in the hands of the Governor acting not in his discretion but in the exercise of his individual judgment * A somewhat different procedure is followed in the case of the subordinate Civil Judicial Service † Qualifications for eligibility are to be set out by the Governor after consultation with the Provincial Public Service Commission and the High Court The Commission will after examinations (if the Governor considers them necessary) prepare a list of suitable candidates out of which the Governor will make appointments in accordance with the regulations as may from time to time be made for the purpose of securing representation of different communities in that service ‡ Matters involving posting promotion and leave fall within the jurisdiction of the relevant High Court without prejudice to such rights of appeal as officers may enjoy under the Act §

Legal implications of the provisions

Two points emerge from the provisions made in connection with the District Judges and the Subordinate Civil Judiciary First as regards the former no mention is made of the representation of communities which may raise the presumption that the section bars communal representation as such unless paragraph (*b*) of sub section (1) of Sec 52 which specifies the Governor s special responsibility for the safeguarding of legitimate interests of minorities is brought in and made to control the section If it is so controlled then reference to communal representation in the subordinate Civil Judicial Service made in sub-section (2) of Sec 255 is redundant inasmuch as the appointing authority is the Governor Secondly in the case of the appointment of District Judges || the Governor is to act in the exercise of his individual judgment while in respect

* s. 254 (1)

† s 255 (1)

‡ s. 255 (2)

§ s 255 (3)

|| For the purposes of the Act the expression District Judge includes additional District Judge Joint District Judge Assistant District Judge Chief Judge of a Small Cause Court Presidency Magistrate Sessions Judge Additional Sessions Judge and Assistant Sessions Judge [s 254 (3)] The expression subordinate civil judicial service means a service consisting exclusively of persons intended to fill civil judicial posts inferior to the post of District Judge [s 255 (1)]

of subordinate judicial appointments, where also the Governor is to act, no provision is made for the "the exercise of his individual judgment"

There are three common expressions in the Act with reference to the mode of the Governor's action, namely, the "Governor," "the Governor acting in the exercise of his individual judgment" and "the Governor acting in his discretion" (the same principle applies to the Governor-General also) If it is correct, as was made clear in Parliament and in Committee when the India Bill was under discussion, that "the exercise of individual judgment" implies consultation with Ministers, but no Ministerial responsibility for action taken and that "in his discretion" implies neither Ministerial consultation nor Ministerial responsibility for action taken, then it follows that the Governor means the Governor acting on the advice of his Ministers and that the responsibility in fact belongs to the latter having regard to the responsible form of government introduced under the Act * The deliberate omission in Sec 255 of the phrase (individual judgment) which occurs in Sec 254 may encourage fighting Ministers to force the hands of the Governor Deadlocks are almost certain should the Governor concerned be one who may have no regard for constitutional propriety

II Safeguards in respect of Education and Languages

Proposals made by different parties

The signatories to the Minorities Pact claimed the right to establish, manage and control at their own expense, charitable, religious and social institutions, schools and other educational establishments with the right to exercise their religion therein † They demanded safeguards for the promotion of their education, language and for a due share of grants-in-aid by the State and public bodies ‡ It was urged on behalf of the Anglo-Indians

* For fuller treatment of the subject see below Whatever might have been said in Parliament or elsewhere it is not *legally* obligatory on the Governor General or the Governor to consult his Ministers in any matter except in those specifically mentioned in the Act, for example, in respect of matters enumerated in s 17 (2), (3) and (4) or s 59 (2), (3) and (4)

† Clause 4 ‡ Clause 5

that they must enjoy the right to administer their educational institutions subject to the control of Ministers and that provisions must be made for generous and adequate grants in aid and scholarships on the present basis In the Poona Agreement regarding the depressed class question signed by leaders of the caste Hindus and depressed classes and ratified by Mahatma Gandhi in September, 1932, a clause was inserted to the effect that a certain definite sum out of the Government grants should be earmarked for the promotion of education of the depressed classes In the Punjab the Sikhs demanded that the Government should provide for the teaching of *Gurmukhi* script where a certain fixed number of scholars was forthcoming These in brief sum up the whole case of minorities in respect of educational and linguistic safeguards

Important provisions in the Minorities Treaties

The League Minorities Treaties, it may be noted have laid down the principle that in the public educational system in towns and districts where there is a considerable minority the State concerned will provide adequate facilities ensuring that in the primary schools instruction should be given to the children of the minority through their mother tongue The Government concerned have however the right to make the teaching of the national language obligatory in such schools It has further been stipulated in the Treaties that in districts and towns where a considerable proportion of citizens belongs to a minority such a minority shall be assured of an equitable share in the enjoyment and application of funds which may be provided out of national municipal or other budgets The Treaties have further extended to minorities the right to establish manage and control at their own expense religious educational and charitable institutions a provision which seems to have been adopted practically *verbatim* in our Minorities Pact Some of the Succession States such as Czecho-Slovakia and Yugo-Slavia have incorporated these provisions in their constitutions * Again in Poland not only is a share of the public funds guaranteed to the Jews for the promotion of education of their children but it is provided that the money thus allocated should be spent by the educational committees appointed by the Jews and inspiring their

* Chap IV *supra*.

confidence.* Similarly the Lausanne Treaty stipulates† that the sums allotted by the Turkish Government to minority schools shall be made over to representatives of the establishments concerned for distribution. Along identical lines Yugo-Slavia binds herself under a Treaty to give protection to her Mahomedan citizens in regard to the allocation of public funds for their education.‡ In the Esthonian constitution we find that in districts or areas where the majority of the population is not Esthonian but belongs to a racial minority, such a minority is given the right to use its language in the administration of public activities. But the self-governing bodies which use the language of a minority are required to use the national language in their communications with the Government or with other public bodies which do not speak the minority language. Citizens of German, Russian and Swedish speech may, if they so desire, address the Government in their own language.§

Denominational Schools

Ample provisions have been made in this regard in the German-Polish Convention for Upper Silesia.|| Minorities, for example, are entitled to establish and control private educational establishments at their own expense. The official language cannot be imposed as a medium of instruction in such institutions and the Government are bound to establish a State primary school in any place where an application to that effect is made supported by persons legally responsible for the education of forty children of a linguistic minority. The State is required to provide for denominational schools if forty of such children belong to a religious minority. If, for certain reasons, such schools are not established, minority classes for teaching the

* Art. 10 of the Polish Treaty. † *Ibid.* Art. 41.
‡ Chap. IV, *supra*. § *Ibid.*
|| In the middle of July, 1937, this complicated agreement running into more than 600 articles formally expired under Art. 64. ("600" should be read for "100" in Chap. IV relating to the number of Articles of the Convention.) In November of the same year, however, an agreement was concluded between Germany and Poland with regard to the treatment of their respective minorities. The agreement prohibits any attempt to assimilate a minority and guarantees to the minorities free use of their languages and the right to form organisations, maintain schools and have Church services in their own languages. It provides further that the minorities will not be hindered in the possession or acquisition of real estate.

language and religion of minorities must be provided for Provision has been made for adequate representation of minorities in the school committees and for establishment of secondary and higher schools for minorities under certain conditions There are various other clauses in the Convention regarding educational safeguards * It is to be noted that according to President Masaryk the scope of the educational clauses of the Czecho-Slovakian Treaty is not confined to primary education only and that three million Germans in Czecho-Slovakia have been given a University and two technical high schools † In Germany which is not bound by any Minorities Treaty save in regard to Upper Silesia it has been laid down in her constitution that primary schools may be established in a locality on the request of persons responsible for the education of children in accordance with their religious creed Generally the establishment of private primary schools is illegal, but the law is relaxed in favour of a minority ‡

Reasons why in India these questions not so important.

The reason why minorities in India have not hitherto been so insistent on these safeguards as they have been in respect of their representation in legislatures and Cabinets seems to be that existing arrangements constitute some guarantee of the protection of their rights Sums are provided out of educational grants made by the Provincial Governments and self-governing bodies for the education of the children of the backward classes The cause of Mahomedan education has also received considerable attention Grants in aid are given to *muktabs* and in certain provinces colleges have been established at State expense primarily for Mahomedan scholars *e g*, the Islamia College in Calcutta The Universities such as Aligarh and Dacca give special facilities for education to Mahomedans In the University of Calcutta a Chair has been established for Islamic studies Grants in aid for the benefit of the Anglo-Indian and European communities were well protected under the Government of India Act Anglo-Indian and European education having been a reserved subject

* Chap IV *supra* † *Ibid*

‡ Chap. VIII *supra* Compare the drastic measures taken in Germany under Herr Hitler

Provisions for Anglo-Indian and European education

By Sec 83 of the Government of India Act, 1935, an effective safeguard appears to have been provided for Anglo-Indian and European education in the provinces It is laid down that if in the last complete financial year before the commencement of the relevant part of the Act an educational grant for Anglo-Indian and European education or either of them was included in the general educational grants in the province concerned, then in each subsequent financial year a grant shall be made for the benefit of the said community or communities not less in amount than the average of the grants made for its or their benefit in the ten financial years ending on the thirty-first day of March of the year 1933 * If, however, in any financial year the total grant for education is less than the average of the total educational grants for those ten years, then whatever fraction the former may be of the latter any grant in that financial year for Anglo-Indian and European education or either of them need not exceed that fraction of the average of the grants made for its or their benefit in the said ten financial years As Mr Butler explained in Committee,† if the general educational grant for a particular year in a province were, say, £1000 and the Anglo-Indian and European grant for that year was £ 100, then if the general educational grant were reduced to £800, the Anglo-Indian and European grant would be correspondingly reduced to £80 ‡ Provisions of the section might be abrogated by the Provincial Legislative Assembly provided that a decision to that effect was taken by resolution by a majority which includes at least three-fourths of the members of the Assembly To that three-fourths majority is added the additional safeguard in that nothing in the section will affect the special responsibility of the Governor for the safeguarding of the legitimate interests of minorities § An attempt to make the repeal dependant on the vote of the majority

* It embodies the terms of the agreement reached at the third Round Table Conference by the Halifax Committee which included besides the Chairman, Sir Hurbert Carr, Sir Henry Gidney, Sir Mahammad Iqbal and Mr M R Jayakar

† Commons Committee Debates on the India Bill, March, 1935

‡ In computing for the purposes of this sub section the amount of any grants, grants for capital purposes are to be included

§ s 52,

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‡ In computing for the purposes of this sub section the amount of any grants, grants for capital purposes are to be included

§ s 52.

including at least three-fourths of the members of both the Provincial Legislative Assembly and the Provincial Legislative Council wherever it existed proved abortive and the ground urged against it was as Mr Butler stated in Committee * that the Upper Chamber in a Province should not, and was not, intended to have the same power of control over supply as the Lower House, or even the Upper Chamber in the Federation

Governors special responsibilities

Assuming now that power is taken by a Provincial Assembly in the manner specified in sub-section (2) of the section to nullify the statutory protection of the Anglo-Indian and European educational grants can the Governor by sub-section (3) provide any sum for such education in exercise of his special responsibilities as defined in Sec 52? There is nothing in that section to authorise the Governor s control over supply except in so far as he is required to act in his discretion in deciding whether any expenditure falls within the class of expenditure charged on the Provincial revenues † and there are seven specified items‡ of such expenditure which do not include any specific reference to the educational grants for Anglo-Indian and European education

But reliance may be placed on Sec 80 of the Act which gives the Governor power to include in the Schedule of Provincial expenditure any demand for grant refused or reduced by the Assembly should in his opinion such refusal or reduction affect the due discharge of his special responsibilities It is doubtful if the Governor can under this section overrule Ministerial action sanctioned by the requisite majority in the Assembly for the possible conflict contemplated in the section appears to be one between the Governor aided and advised by his Ministers and the Provincial Assembly and not between the Governor on the one hand and the Ministers acting with the Assembly on the other The question may not emerge as a practical issue in any province

* Commons Committee Debates March 1935

† s. 78 (3) and (4)

‡ In the case of the Governor-General the specified items are eight in number instead of seven. The Governor-General for example has a special responsibility in respect of the safeguarding of the financial stability and credit of the Federal Government (s 12)

but its theoretic importance cannot be ignored It seems to us that the relevant law on the subject has been stated rather vaguely. Nor perhaps does paragraph (*b*) of sub-section (2) of Sec 78, which empowers the Governor to direct inclusion in the schedule of expenditure of sums as being necessary for the due discharge of any of his special responsibilities, afford adequate protection against unyielding Ministries who command the confidence of the legislature *

The protection of languages in India

The question of language does not present in India a difficulty of the same nature and gravity as we find in the Succession States of Europe or in certain parts of the self-governing Dominions of the British Commonwealth Here in this country a linguistic minority does not generally correspond to a religious minority In Bengal, for example, Bengali is the language of the caste Hindus, the scheduled castes and the Mahomedans alike Similarly in Upper India *they generally speak Hindi or Urdu or Hindusthani* The problem, however, is somewhat complex in Madras where there are three or four spoken languages, in parts of Bihar and Orissa† where the Biharis live side by side with the Oriyas and Bengalees and in certain districts of Assam where the Bengalees live side by side with the Assamese But the fact is clear that Hindus as a religious community are not opposed in respect of language to Mahomedans as a religious community, that is to say, Hindus and Mahomedans have identical linguistic interests in definite areas despite their religious differences The language of each province is as a general rule recognised in the proceedings of the Court, particularly of the lower grade, although judgments are delivered in English Public servants who do not know the language of the province where they serve are required to pass a Provincial language test In primary schools the medium of instruction is the language of the scholars

* The action of the Assam Governor some time in December, 1937, in recommending by message the consideration of a supplementary demand for grants despite the refusal of the Ministry to place it before the Assembly was extremely improper and unconstitutional The Act gives the Governor no power to place demands himself before the legislature, although they must be made on his recommendation [s 79 (3)]

† The problem has to some extent been solved both in Bihar and Madras by the separation of Orissa, but new problems have arisen in Orissa

The University of Calcutta has adopted the language of the province or, more accurately, the languages of the provinces which for the time being fall under its jurisdiction, as the medium of instruction in secondary schools affiliated to it * It is likely that other Indian Universities will follow suit and in fact already the question of providing secondary education to the scholars through the medium of their mother tongue is being seriously discussed in some Indian Universities

Existing arrangements ought to be supplemented

These arrangements fairly comprehensive as they are ought to be supplemented by a definite and clear provision that in districts and areas where a considerable proportion of the population say 20 to 25 per cent of the population belongs to a religious or linguistic minority, such a minority shall have the right to establish educational institutions of their own for whose upkeep the State or self governing bodies must provide adequate sums out of their educational grants Besides provisions should be made out of the State or municipal or other budgets for the spread of education among the backward or depressed classes Such obligations must be binding upon the Governments and public bodies concerned In provinces or areas where there is a rigorous system of untouchability more drastic regulations than these seem to be necessary

A sensible move in Bombay

Attention may be drawn in this connection to the courageous and sensible move which has been taken by the Government of Bombay † Educational officers have been asked to see that no disability is imposed on children of the scheduled castes in schools maintained or aided out of public funds Where public schools are held in temples or sacred buildings or in buildings hired for the purpose subject to the condition of the exclusion of children of the scheduled castes efforts should be made to obtain other accommodation for those schools The resolution of the Government explicity states that all pupils should sit together in class irrespective of caste distinctions and that separate arrangements for pupils of the scheduled castes or

* *Vide* the Senate Proceedings of July 1939

† Resolution of the Bombay Government issued in May 1935

others should not be allowed In Bengal, where the problem of untouchability either does not exist or is not so acute as it is in Bombay or Madras, we may do without such regulations, but if it is found that local customs or usages operate prejudicially to the interests of the scheduled castes in educational institutions maintained or subsidised out of public funds, there should be no hesitation on the part of the Government to deal with them effectively so that members of the depressed classes may not be subjected to discrimination The Bombay Government's resolution should be a useful guide to other Governments also in respect of public amenities such as the use of hospitals, wells and tanks and public vehicles As regards public hospitals, the Bombay Government have asked the Surgeon-General to instruct civil surgeons and other Medical officers concerned to see that no discrimination is made in the treatment of patients on grounds of caste or religion Grants to local bodies for water supply are to be reduced should they fail to take measures to secure equal treatment Similar orders have been issued regarding public conveyances also

The use of English in courts and legislatures

Now, proceedings of each Provincial legislature should be published both in English and the language or languages of that province It should be the duty of each Provincial Government to cause, on the lines of the South Africa Act and the Irish Constitution Act,* two copies of all laws to be made, one being in English and the other in the language of the province Where there are more languages than one as many copies should be made as there are languages, in addition to the English copy It is difficult, however, to make this position in regard to the Federal or Central legislature for the obvious reason that the people as a whole speak so many different languages Provision made in the Government of India Act, 1935, in regard to the use of language in the legislatures† seems to show undue bias in favour of English It is laid down that all proceedings in the legislatures, Federal as well as Provincial, shall be conducted in the English language provided that the rules of procedure of each

* Chap IV, *supra*

† s 39 for the Federal Legislature and s 85 for the Provincial Legislation, Para 379 of J P C Report

Chamber and the rules with respect to joint sittings shall enable persons, unacquainted or not sufficiently acquainted with the English language, to use another language It practically makes the use of English compulsory in a country where the vast majority of the people have not even a nodding acquaintance with it and relegates the Indian languages to a subordinate position

We are not opposed to English being used in debates on the floor of a Legislative Assembly or Council, but its use should be optional The concession made in the case of members not acquainted or sufficiently acquainted with the English language should not be restricted to them alone What is desirable is that every member of the legislature should have the right to use either English or his own language in discussions or debates in the legislature, and that the proceedings as has already been suggested should be published in both the languages and where there is more than one Indian language, in English and at least in the dominant language of the province and at the Federal Centre only in English at least for some years to come The provision contained in the Congress constitution as amended in Bombay, 1934 in this respect is more liberal than that in the new India Act * But there also some partiality has been shown for Hindusthani which Bengal and Madras may have reasons to resent Many in this country are of opinion that for many years more English should ordinarily be the vehicle of expression in All India Congress organisations with the right accorded to individual members to use their respective languages They are not ashamed to confess with all deference to Mahatma Gandhi that Hindusthani is not yet the national language of India and that opinions in authoritative circles differ as to whether it should be made so in future There will, however be general support for the provision that all proceedings in every High Court† and the Federal Court‡ shall be in the English language

* Art VII. (a) The proceedings of the Congress the All India Congress Committee and the Working Committee shall ordinarily be conducted in Hindusthani the English language or any Provincial language may be used if the speaker is unable to speak in Hindusthani or whenever permitted by the President (b) The proceedings of the Provincial Congress Committees shall ordinarily be conducted in the language of the province concerned Hindusthani may also be used.

† s. 227

‡ s. 214.

III Reserve Powers of the Governor-General and Governors

History of the problem

It is interesting to examine the provisions made in the Government of India Act, 1935, investing the Governor-General and the Governors* with reserve powers for the purpose of protecting the interests of minorities. In paragraph 6(2) of their Report the Provincial Constitution Sub-Committee of the first Round Table Conference observed "The Governor's power to direct that action should be taken otherwise than in accordance with the advice of the Ministers shall be restricted to the discharge of the specified duties imposed on him by the constitution These duties shall include the protection of minorities " In closing the plenary session of that Conference on the 19th of January, 1931, the Prime Minister approved of the principle laid down by the Sub-Committee and said that "there will be reserved to the Governor only that minimum of special powers which is required in order to guarantee the maintenance of rights provided by statute for minorities " At the close of the second session of the Conference on

* There has been a remarkable change in the mode of appointment of the Governor-General and a Provincial Governor and also in their status Both the Governor General and a Provincial Governor are under the new Act " appointed by His Majesty by a Commission under the Royal Sign Mannual " (Ss 3 and 48) while under the Government of India Act they were " appointed by His Majesty by warrant under the Royal Sign Manual " [Ss 34 and 46 (2)] Governors of Provinces other than the three Presidencies, however, were appointed after consultation with the Governor-General That difference in status between Presidencies and other Provinces has now been removed The new mode of appointment contemplates (1) Letters Patent constituting the office, (2) a Commission appointing a particular person to that office, and (3) an Instrument of Instructions issued to that person on appointment All these are prerogative instruments The position of Sir John Anderson as Governor of Bengal was challenged without success in 1937 in a case before a Division Bench of the High Court of Calcutta as being illegal and *ultra vires* on the ground that there was no Commission appointing him to that office There is hardly any doubt that the omission was unfortunate and improper, especially when all the formalities were observed in the case of the Governor General In rejecting the case the court relied upon the provisions of Sec 321 of the Act Under the old Act the Governor-General and not a Provincial Governor was part of the relevant legislature (Ss 63 and 72A) while the new Act provides that the Federal legislature shall consist of His Majesty, represented by the Governor-General, and two Chambers (s 18) and that the Provincial legislature shall consist of His Majesty, represented by the Governor, and in certain provinces, two Chambers, and in the rest, one Chamber (s 60) Counsel for the plaintiff relied also on the difference between the executive authority in a province as contemplated in s 46 of the Government of India Act and that contemplated in s 49 of the new Act read with s 59

the 1st of December, 1931, Mr MacDonald expressed the view that the Governor General must be granted the necessary powers to enable him to fulfil his responsibility for securing the observance of the constitutional rights of minorities

In his statement made on the 3rd of December, 1932, before the third session of the Round Table Conference Sir Samuel Hoare reiterated the policy of His Majesty s Government in more specific terms The Secretary of State replying to Sir Tej Bahadur Sapru s argument that minorities should for their protection depend on declarations of fundamental rights and intervention of the Federal Court* said that that procedure would be ' too long and ponderous and would mean too great delay ' He added that ' over and above the safeguard of a Federal Court and any declaration of fundamental rights that might be included in the constitution, it was essential that the Governor General and the Governors should have exceptional powers of intervention †

Special responsibilities and discretionary powers.

The Governor General and the Governor s special responsibility as defined in the White Paper and the report of the Joint Parliamentary Committee and incorporated in the Act of 1935 includes amongst other things the safeguarding of the legitimate interests of minorities ‡ It is to be noted that although in regard to this matter the right to advise the Governor General or the Governor and initiate proposals rests with Ministers the Governor General or the Governor is free to act in defiance of Ministerial advice tendered § It is enacted that in the discharge of his special responsibilities the Governor General or the Governor shall exercise his individual judgment || There are other provisions in the Act which authorise him to act independently of his Ministers for example, in respect of his power (1) to promulgate ordinances during the recess of the legislature in certain cases (2) to promulgate ordinances¶ at any

* See *The Statesman* of the 3rd of December 1932

† See *The Statesman* of the 4th of December 1932

‡ J P C Report paras 168 160 78 and 79

§ The Government of India Bill (Explanatory Memorandum) para. 10 and 4790

|| Ss. 12 (c) and 52 (b)

¶ It appears that ordinances under the relevant sections may be promulgated once and renewed once only [Ss. 42 (2) and 89 (2)]

time with regard to certain subjects, (3) to enact Acts in certain circumstances, and (4) to issue proclamations and assume to himself all or any of the powers vested in or exercisable by any authority provided that any measure adopted in this behalf shall not suspend in whole or in part the operation of any provisions of the Act relating to the Federal Court or the High Court as the case may be * In exercise of all his reserve powers the Governor-General or the Governor is required in respect of certain matters to act " in his discretion " and in respect of others " in the exercise of his individual judgment "

Terms of art?

These are somewhat novel expressions, especially the phrase " in the exercise of his individual judgment "† Mr Churchill was led to remark that they were mere terms of art In moving an amendment to clause 9 of the India Bill in the Committee of the House of Commons Mr Herbert Williams took care to explain those phrases First of all, he said, there were cases where the Governor-General (or the Governor) took his own decision subject to the Instrument of Instructions issued to him and the control of the Secretary of State That was when he acted " in his discretion " and without any reference necessarily

* Ss 42 45, Ss 88 90 and s 93

† Note should, however, be taken of the interpretation that " discretion " has received in important judicial decisions, although the Government of India Act, 1935, bars judicial review in cases where the Governor-General or the Governor is required to act " in his discretion " or " in the exercise of his individual judgment " " Where something is left to be done according to the discretion of the authority on whom the power of doing it is conferred, the discretion must be exercised honestly and in the spirit of the statute, otherwise the act would not fall within the statute " (Maxwell—*The Interpretation of Statutes*, p 109) The judicial dicta laid down in this respect are (1) the discretion must be exercised according to "the rules of reason and justice, not private opinion," (2) the exercise of discretion must be "legal and regular" and "not arbitrary, vague and fanciful" and "according to law and not humour," and (3) the discretion must be exercised " not capriciously but on judicial grounds and for substantial reasons " and " within the limits to which an honest man competent to the discharge of his office ought to confine himself, that is, within the limits and for the objects intended by the Legislature " (Maxwell—*The Interpretation of Statutes*, pp 109 10) In so far as actions of the Governor-General or the Governor have been ousted under the India Act of 1935, from the jurisdiction of the Indian Courts, these maxims do not apply in a juristic sense, but the Governor-General or the Governor would do well to bear them in mind while using his " discretionary " authority in carrying out the purposes of the Act These principles should apply also where he is required to act " in the exercise of his individual judgment "

to his Ministers The next category of cases was one in which he asked his Ministers for their views, and having obtained them, took his own decision subject as in the former cases, to the Instrument of Instructions and the Secretary of State's control and, in the case of the Governor also to the Governor General s control That was when he acted in the exercise of his individual judgment The third category covered those cases in which Ministers were entitled to tender advice as Ministers in England tendered advice to the Sovereign, and where the Governor General (or the Governor) was *constitutionally*, though not *legally*, bound to act on the advice of his Ministers subject, as explained, to the provisions of the special responsibilities sections of the Act or of those sections which empower him to act in the exercise of his individual judgment

Relevant documents

In explaining the position of His Majesty s Government the Solicitor General observed that the words individual judgment were used in relation to actions by the Governor-General (or the Governor) in his individual judgment in the ordinary sense of the phrase within the ambit in which normally he would be acting on the advice of his Ministers The words ' in his discretion were used where the Governor General (or the Governor) would be acting in his own judgment but in an area outside that field In other words that kind of action applied where Ministerial responsibility was deliberately denied for example in the reserved departments of the Federation The Solicitor General s interpretation of the phrase in his discretion leaves room for confusion inasmuch as in the provinces where no department is reserved the Governors are given power to act in their discretion in respect of certain matters and at the Centre also the Governor General has power to act in his discretion in specified matters which do not belong to the reserved departments An attempt has however, been made to construe the expressions in Paragraph IX of the Instrument of Instructions issued to the Governors The intention of the framers of the Act was again sought to be brought out in Paragraph 10 of the Explanatory Memorandum appended to the Government of India Bill when it was under discussion in Parliament It stated *inter alia*

that "in regard to any power or function so described (the exercise of which is in his discretion) Ministers have no constitutional right to tender advice, but in regard to every matter not described as being exercisable by the Governor-General (or Governor) in his discretion the right to advise, i e, to initiate proposals, rests with Ministers The second technical term (the first being "in his discretion") used in this connection throughout the Bill is the phrase "in the exercise of his individual judgment" This phrase, which is applicable to matters within the purview of Ministers, means that the Governor-General (or the Governor) after considering the advice of Ministers is free to direct such action to be taken as he thinks fit, that is to say, not necessarily to accept the advice tendered to him That the advice of Ministers is *constitutionally* binding in other matters, i e, in matters in respect of which the Governor-General or the Governor is not given power to act "in his discretion" or "in the exercise of his individual judgment" is made clear in Paragraph IX of the Governor's Instrument of Instructions which contains a direction to the effect that

> "In all matters within the scope of the executive authority of the Province, save in relation to functions which he is required by or under the Act to exercise in his discretion, our Governor shall in the exercise of the powers conferred upon him be guided by the advice of his Ministers, unless in his opinion so to be guided would be inconsistent with the fulfilment of any of the special responsibilities which are by the Act committed to him, or with the proper discharge of any of the functions, which he is otherwise by or under the Act required to exercise in his individual judgment, in any of which cases our Governor shall, notwithstanding his Ministers' advice, act in exercise of the powers by or under the Act conferred upon him in such manner as to his individual judgment seems requisite for the due discharge of the responsibilities and functions aforesaid"

Control by Governor General and Secretary of State

The language of Ss 9 and 50 is practically identical with that used in the relevant paragraph of the Instrument of Instructions* quoted above In so far as the Governor of a Province is required

* The validity of any thing done by the Governor-General or a Governor shall not be called in question on the ground that it was done otherwise than in accordance with

to act in his discretion or in the exercise of his individual judgment, he shall be under the general control of and comply with such particular directions, if any, as may from time to time be given to him by, the Governor General in his discretion, but the validity of any thing done by a Governor shall not be called in question on the ground that it was done otherwise than in accordance with the provisions of this particular section * A like control is exercisable by the Secretary of State where the Governor General is required by or under the Act to act in his discretion or in the exercise of his individual judgment and the immunity extended to the Governor applies also to the Governor General †

It is clear that these provisions detract considerably from the autonomy in the provinces and the responsibility at the Centre even in matters not reserved to the Governor General acting with Counsellors but there is nothing in the Act preventing the growth of conventions in actual working which may leave these safeguards obsolescent so that the sphere of Ministerial responsibility may extend to the entire field of the executive authority in a province or at the Centre save perhaps in the case of the Federation the reserved functions of the Governor General It will be seen that the choosing summoning and dismissal of Ministers are functions which the Governor General at the Centre or the Governor in a province is to discharge in the exercise of his discretion ‡ but there is nothing to suggest that in making appointments to his Council of Ministers on the inauguration of Provincial autonomy any Governor has made a departure from the general practice of responsible government and thrust

any Instrument of Instructions issued to him (Ss 13 and 53) The mandatory effect of Ministerial advice n certain matters as stressed in the Instrument is to be interpreted *constitutionally* and not from the point of view of strict law There is *legally* no remedy against a Governor should he refuse to act upon the advice of his Ministers Besides he has the right to dismiss his Ministers in his discretion (Ss 10 and 51) and legal immunity is extended to him whether in a personal capacity or otherwise (306) Express references to the remedies must be made in the Constitution Act if they are to be made available in enforcing constitutional principles Read decisions in *Attorney General for New South Wales* v *Trethowan and others* (A.C 526 1932) and *Rex* v *Governo of South Australia* (4 C. L. R. 1497; 1907) The Instrument only indicates the manner in which the Governor should behave constitutionally in relation to his Ministers it does not lay down a legal formula

* s. 54.

† s 14

‡ Ss. 10 and 51

his nominees on an unwilling Premier The Orissa case already cited proves that the last word has been with the Premier and that the Governor's approval has been more or less of a formal nature. But the action of certain Governors, particularly Sir Jon Anderson in Bengal, in presiding regularly at meetings of the Council of Ministers in exercise of the power conferred upon them by sub-section (2) of Sec 50 has been extremely unhappy and unwise being repugnant to the theory and practice of responsible government

The King's relation with the Cabinet in U K

The issue may be examined in a historical perspective It was perhaps in the reign of George I that the Sovereign for the first time ceased to preside at meetings of the Cabinet in the United Kingdom, and that fact is to be explained by the Kings's lack of knowledge of English It is, however, said of Queen Anne that she took care to attend and preside at such meetings weekly, but it has been a clearly recognised constitutional practice since then that the Sovereign keeps absent from meetings of the Cabinet, including Committees of the Privy Council where deliberations or discussions take place, although there are records to show that under George III "pardons were dealt with in Cabinet in the King's presence"* The Cabinet should not, however, be confused with the Privy Council, for while the former is a deliberative body the latter is essentially executive The Cabinet advises the Crown and members thereof are not bound by any oath of secrecy save by virtue of the fact that a Cabinet Minister cannot act as such unless he is sworn of the Privy Council The Cabinet decides policy while the Council executes it by Orders The summons for a Cabinet meeting are different from the summons for a meeting of the Privy Council, and a Cabinet is summoned by the Prime Minister, since 1916, through the official Secretary to the Cabinet while the Council is summoned by the Clerk of the Council Nor is the Cabinet a term of art known to Indian law, the Council of Ministers is the expres-

* In the Dominions also the King's representatives do not preside at meetings of the Cabinet, and as far back as 1854 the present practice was adopted in Canada under Sir E Head See Anson's *The Law and Custom of the Constitution* (edited by Keith), Part I, p 58.

sion used in the India Act of 1935, *and it is in their capacity* as Ministers of the Council that they take the oath administered by the Governor The explanation for the Governor s action in Bengal in presiding at meetings of the Council is perhaps to be found partly in the distinction in strict law between the Council of Ministers and the Cabinet and partly in the composite nature of the Cabinet and lack of political experience and leadership on the part of the majority of Ministers It would be unfair not to add that in the provinces also where the Congress is in power Governors preside at meetings of the Council of Ministers

Assurances of non intervention in constitutional activities.

It will not be out of place here to examine the implications of the Congress Committee s resolution of the 16th March 1937, demanding of Governors assurances of non intervention in regard to the constitutional activities of their Ministers as a condition precedent to acceptance of office* by the Congress party wherever they may be in the majority and the Governor General s message delivered on the 21st June 1937 which apparently persuaded the Congress Cabinet on the 7th July 1937 to authorise acceptance of office in certain circumstances It is rather unfortunate that Congress leaders should have failed at the outset to explain what they meant by constitutional activities for the entire controversy that subsequently arose turned upon that rather elastic and wide term If it meant functions in the *Ministerial* field in respect of which a Governor was not required to act in the exercise of his individual judgment the advice of Ministers was *constitutionally* binding on him and there was absolutely no need for any assurance from him That point has been clarified by the Gover

* The operative part of the resolution reads thus On the pending question of office acceptance the All India Congress Committee permits Congress parties to accept office where the Congress party is in a majority in the legislatures provided that Ministerships shall be accepted only if the leader of the Congress party is satisfied and is able to state publicly that the Governor will not use his powers of interference or set aside the advice of his Ministers in regard to their constitutional activities It will be useful to remember in this connection that a statute like the Government of India Act 1935 may be interpreted merely as statute or as a constitution The general principle followed under the Anglo-Saxon system leans towards the statutory interpretation, and from this point of view Lord Linlithgow was on firmer ground than the Congress Committee Read *The Canadian Ba Review* (June 1937) especially Professor Kennedy s article on The British North America Act Past and Future and Dr Jennings on Dominion Legislation and Treaties.

nor-General in his message in which stress has been laid on the "mandatory" effect of Ministerial advice in such matters*?

The Congress formula contrary to the Act

If, on the contrary, it had reference to functions which were ordinarily outside of the Ministerial sphere and in respect of which a Governor was required to act in his discretion or to functions in the Ministerial field in respect of which he was required to act in the exercise of his individual judgment, it was not legally open to him to give the assurances asked for and thus contract out of the obligations which Parliament has imposed on him and for the due discharge of which he is in ultimate resort responsible to the Secretary of State. It is one thing not to use "special responsibilities" or exercise "discretionary" powers and it is quite a different thing to hold out a promise that the law would not be given effect to in any circumstances. While it is within the rights of a Governor not to use those powers or exercise those rights in a given case he is not competent in terms of the Act to say in advance that his reserve powers would not be applied to any conceivable case. The Congress formula was a misconstruction of the entire structure of the Act, and yet we were told, curiously enough, that it involved no amendment or modification of the Act which was reserved for a more ceremonial occasion such as a Constituent Assembly. That the Working Committee authorised acceptance of office† as a result of the Governor-General's message is proof that they realised their mistake, for that message is at best an enunciation of the law incorporated in the Act read with the Instrument of Instructions, if only couched in conciliatory terms as compared to the robust and reckless phraseology of the earlier pronouncements of persons in authority in Parliament.

"Minority Governments" not illegal

Nor is there substance in the doctrine that "interim" Ministries in provinces where the Congress party was in the majority in the As-

* The Governor-General said that "in all such matters (those belonging to the Ministerial field) in which he (the Governor) is not specially required to exercise his individual judgment, it is mandatory upon the Governor to accept the advice of his Ministers." For the precise effect in law of Ministerial advice refer to pp. 513 and 514, *supra*.

† The operative clause of the resolution reads thus: "The Committee has come to the conclusion and resolves that Congressmen be permitted to accept office whenever they may be invited thereto."

semblies were illegal, for the Act provides nothing beyond stating that there shall be a Council of Ministers to aid and advise the Governor in the discharge of some of his functions It means that unless there is recourse to s 93 in the case of the provinces and s 45 in the case of the centre the King's Government cannot carry on without a Council of Ministers The Instrument of Instructions on which much reliance was placed in challenging the legality of the Minority Governments only directs a Governor to make best endeavours to make appointments to his Council of Ministers in accordance with a particular procedure therein indicated In strict law disobedience of the Instructions does not invalidate the Governor's action In forming as they did what might be called Minority Governments in certain provinces the Governors concerned violated neither the provisions of the Act nor the directions of His Majesty contained in the Instrument of Instructions to the Governors and all that can be said is that in so far as the authorities failed to explore the possibilities of *rapprochement* with the Congress where it was in a majority (a policy subsequently followed by Lord Linlithgow) they acted rather hastily if not improperly

Reservation and disallowance.

It is well known that in the self governing Dominions there were three different methods by means of which control over Dominion legislation could be exercised There were (*a*) refusal of assent to Bills (*b*) reservation of Bills till the pleasure of the Crown has been obtained and (*c*) disallowance of an Act As Professor Keith says the first method has now been abolished for all practical purposes * The other two methods therefore call for examination in this connection

Two methods of reservation

Provisions dealing with reservation may be divided into (*a*) those which confer on the Governor General a discretionary power of reservation and (*b*) those which specifically oblige the Governor General to reserve Bills dealing with particular subjects The discretionary power of reservation is to be found in all

* Keith *Responsible Government in the Dominions* Vol. II pp 748-49

the Dominion constitutions.* Provisions requiring Bills concerning particular subjects to be reserved by the Governor-General exist in the Australian, New Zealand and South African constitutions.†

Reservation practically abolished

The Dominions have generally looked upon these reserve powers with considerable suspicion. They have considered these an irksome and irritating interference by the Governor-General in Imperial interests with their legislation. So a declaration was made at the Imperial Conference in 1926 "which placed on record that apart from provisions embodied in the constitutions or in specific statutes expressly providing for reservation it is recognised that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs."‡ And there is in the Report of the Conference on Dominion legislation a definite and clear recommendation for the abolition of these reserve powers, both discretionary and compulsory.§ The authors of the Report observe, "as regards the continued existence of the power of reservation certain Dominions possess the power of amending their constitutions to abolish the discretionary power and to repeal any provision requiring reservation of Bills dealing with particular subjects, and it is therefore open to those Dominions to take the prescribed steps to that end, if they so desire." As to those Dominions which have no such constitutional right to amend the provisions, it is proposed in the Report that the Government of the

* Ss. 56 and 59 of the New Zealand Constitution Act, Ss. 55 and 57 of the British North America Act, 1867, Ss. 58 and 60 of the Commonwealth of Australia Act, 1900, Ss. 64 and 66 of the Union of South Africa Act, 1909, and Art. 41 of the Irish Free State Constitution.

† s. 65 of the New Zealand Constitution, s. 74 of the Australian Constitution, Ss. 64 and 106 of the South Africa Act and Para. 25 of the Schedule to that Act. Read also the provisions of paragraph XVIII of the Governor's Instrument of Instructions under the system inaugurated by the Government of India Act, 1935, in which the subjects have been specified in respect of which the Governor is bound to reserve Bills for the consideration of the Governor General. It should be noted that these are in form and substance the legislative functions of the Governor or the Governor-General.

‡ Read the provisions of the Status of the Union Act and the Royal Executive Functions and Seals Act of South Africa, 1934, in which there is statutory expression of the constitutional rule that reference to the King in respect of a Dominion shall be construed as reference to the King acting on the advice of his Ministers for the Dominion concerned save where otherwise provided.

§ Cmd. 3479, p. 15.

United Kingdom should ask Parliament to pass necessary legislation, if so required, by the Dominions concerned

The power of disallowance is a Royal prerogative* which was in practice exercised on the advice of the British Cabinet and when the Governor General set the process in motion he acted as an Imperial officer and in Imperial interests This power exists in law in Canada Australia, South Africa and New Zealand † The Irish constitution contains no such provision for disallowance, although in Professor Keith s view it should have on the Canadian model been subject to this reservation ‡ But that view on the question has had apparently no effect on recent Irish legislation The disallowance of completed legislation is so extremely offensive that it is definitely obsolescent, though it is too much to say that

The power of disallowance not exercised.

* The Crown s power to veto legislation in any part of the British Empire exists by common law unless specifically destroyed or repeated by a competent legislature The leading case on the subject is *Attorney General v De Keyser s Royal Hotel Ltd* It was held in that case that the prerogative right to take the lands of a subject without compensation must be read subject to the statutory provisions The power to disallow a Dominion legislation whenever it exists is no longer a prerogative power but in the main a statutory right and cannot lawfully be exercised save in accordance with the statutory provisions whatever might have been the range and extent of the prerogative in the past.

† s 56 of the British North America Act s 59 of the Commonwealth of Australia Act s 65 of the Union of South Africa Act and s. 58 of the New Zealand Constitution Act. The prerogative and not the statutory power rules Newfoundland in this regard for the constitution is based on Letters Patent and not on Statute Section 64 of the South Africa Act in its original form which provides for reservation for the signification of the King s pleasure and Section 65 which provides for disallowance by the King of Bills passed by the Union Parliament and assented to by the Governor-General are repealed by Sections 8 and 11 (2) respectively of the Status of the Union Act 1934 So also are Sec. 66 which also deals with reservation for the Royal pleasure and Sec. 8 which vests the Executive Government in the King repealed by Sec. 11 (1) of the Status Act The provisions of the 1909 Act (s 106) as regards Privy Council appeals are not touched (s 10 of the Status Act) By Sec. 8 of that Act however is retained the Governor-General s power to veto legislation or to put it more accurately to withhold assent from a Bill after its passage through both Houses of the South African Parliament. There is therefore no doubt about the law regarding the Governor-General s power of withholding assent, but it is equally clear that that power is more or less a paper safeguard having regard to the position of responsible Ministers vis-a-vis the Governor General and the provisions of the Royal Executive Functions and Seals Act of 1934.

‡ Keith *Responsible Government in the Dominions* Vol. II p. 750 Art. 41 of the Irish Free State Constitution Act

it is obsolete."* This power of disallowance has not been exercised in relation to Canadian legislation since 1873 and New Zealand legislation since 1867 It has never been exercised so far as Australia and South Africa are concerned Hence it is manifest that the constitutional practice in the Dominions is against the exercise of this exceptional power,† and the Report of the Conference on Dominion legislation expresses the view that " the present constitutional position is that the power of disallowance can no longer be exercised in relation to Dominion Legislation "‡ The authors of the Report recommend that the law should be so altered as to bring it in line with the actual constitutional position §

The effect of the Statute of Westminster

But it is well to bear in mind the law on the subject in the Dominions after the passing of the Statute of Westminster Restrictions in regard to reservation and disallowance as provided for in the British North America Act cannot be removed by the Dominion of Canada or its constituent provinces under the Statute by any Dominion or Provincial Act ‖ They may be abolished by the British Parliament by legislation enacted at the request and with the consent of the Dominion So far as the Provincial Acts are concerned, they may be in law disallowed by the Dominion Government according to the doctrine of *ultra vires* as well as, in the opinion of some experts, on grounds of inequity, unsound principles and such like Now that the Judicial Committee appear to have established the equality of the Federal and Provincial legislatures in their respective functions controversial issues between the Dominion and the Provinces should be decided by impartial and independent arbitration Should, however, the Dominion continue to exercise the right to disallow Provincial Acts, the provinces would either cease to exist as autonomous units or begin to defy the Federal Centre with disastrous effects on

* Keith *Responsible Government in the Dominions*, Vol II, p 756

† Since early in Queen Anne's reign there has been in the United Kingdom no withholding of the Royal assent from a Bill passed by Parliament

‡ Cmd 3479, para 23

§ *Ibid*

‖ s 7 of the Statute of Westminster.

the political structure of the Canadian people Both those eventualities should be guarded against *

Those of the other self governing Dominions, which have accepted the Statute of Westminster, are entitled to abolish provisions in respect of reservation and disallowance by their own Acts by virtue of Sec 2 of the Statute subject to a safeguard only in respect of the Colonial Stock Act of 1900 The position, therefore, is that no Dominion which has borrowed money and had it as a Trustee Stock under that Act can abolish the provisions for disallowance in its constitution absolutely The special case of such loans is effectively protected except perhaps in the Irish Free State where, as has been pointed out above, no provision for disallowance exists in the constitution unless of course Professor Keith is right in thinking that the Canadian constitutional procedure must apply to the Free State a view which it is difficult to sustain particularly in view of recent constitutional developments in that State In other matters the Dominions can act on their own initiative without any interference by the British Parliament, and in the case of Canada Parliament will not dare stand in the way provided a request is made by the Dominion that powers of reservation and disallowance should be repealed by an Act of Parliament

Affirmative and negative powers of legislation.

Now powers of reservation and disallowance are negative powers and even these have become practically obsolete in the Dominions, though not yet removed by statutory enactments in all the Dominions The Government of India Act 1935 has not only conferred upon the King the Governor General and the Governors these negative powers† but invested the Governor General and the Governors with affirmative powers of legislation The

* Professor Kennedy reviews the subject very ably and exhaustively in an Essay entitled The Disallowance of Provincial Acts (*Essays in Constitutional Law*) pp. 63-80 Read pp 542-44 *infra*

† Note the changes made in the Indian law with regard to disallowance by the Government of India Act 1935 In this respect that Act has in strict law eliminated the Secretary of State as the channel for communication to His Majesty in Council and also His Majesty in Council. The power to disallow is instead reserved to His Majesty and a time-limit (within twelve months from the date of the assent of the Governor or the Governor-General to the legislation in question) has been prescribed (Ss 32 and 77)

Governor-General and Governors, for example, have power not only to promulgate Ordinances with life for six months, a power which was accorded only to the Governor-General under Sec. 72 of the Government of India Act, but also to pass Acts on their own responsibility and carry on the administration by Proclamations. The position of the Governor-General and Governors *vis-a-vis* the legislatures, therefore, is in some respects much stronger under the 1935 Act than it was under the repealed statute.

The appointment of Ministers

Closely connected with these powers is the right of the Crown's representative (used in a broad sense and not in the technical sense in which the expression "the Crown Representative" has been construed in the Indian General Clauses Act of 1897 as amended by Order in Council in 1937) to refuse a dissolution, to appoint or dismiss Ministers possessing the confidence of the legislature, to demand a dissolution against the advice of Ministers and the visible will of the legislature and to refuse assent to legislation.' Leaving apart the reserved departments of the Federal Government which will be in charge of the Governor-General acting with Counsellors, Ss. 10 and 51 of the Government of India Act, 1935, lay down the law as regards Ministerial appointments respectively at the Centre and in the provinces. Ministers shall be chosen and summoned by the Governor-General or the Governor in his discretion, as the case may be, and shall hold office during his pleasure. They must be members of either Chamber of the relevant legislatures which means that Ministerial offices are open to members of the Second Chambers nominated by the Governor-General or the Governor in his discretion. It is subject to the proviso that non-member Ministers may hold office for a period of not more than six months. The exact mode of appointment is, however, indicated in the Instrument of Instructions to which re-

The power now is based on statute and not on prerogative. The position of His Majesty under the repealed statute was doubtful [Ss. 69 (1) and 82 (1).] The time limit for New Zealand (s. 58) and Canada (s. 56) is two years, and for Australia (s. 50) one year. As for the Union of South Africa, s. 11 of the Status Act has affected s. 65 of the Union Act which provided one year as the time-limit for the Royal veto.

* For a clear exposition of the system at present in vogue in the United Kingdom read Dr. Jennings's *Cabinet Government*, Chap. XII, pp. 295-338.

ference has already been made But there is no Indian machinery to enforce the observance of the Royal Instructions and the Secretary of State representing His Majesty s Government in the United Kingdom is perhaps the only controlling authority in regard to this matter In law a like procedure of appointment applies in almost all the Dominions* and the United Kingdom There is no striking difference except in form and phraseology between the India Act and the Dominion Acts in respect of the manner in which the functions of the Governor General or the Governor are broadly to be exercised

The Free State procedure

But the Irish constitution which enacts by law responsible government created an interesting precedent in that the discretionary powers of the King s representative were statutorily defined instead of leaving them to the mysterious conventions of the constitution and their mysterious workings The Dail, for instance may not at any time be dissolved except on the advice of the Executive Council † The Council is composed of Ministers appointed by the Governor General on the nomination of the President‡ with the assent of the Dail thus reducing to a statutory rule the constitutional convention followed in the United Kingdom Ministers (except one Senator) must be members of the Lower House § The President of the Executive Council must be appointed presumably by the Governor General on the nomination of the Dail Eireann|| and the President nominates a Vice-President The President and the

* s 11 of the British North America Act s. 63 of the Commonwealth of Australia Act and s 13 of the Union of South Africa Act Note the difference in law between the executive authority in a province and at the centre contemplated in the Government of India Act (Ss. 46 and 33) and that contemplated in the Government of India Act 1935 (Ss 49 and 7) It appears that the Council of Ministers is only to aid and advise and that they have no executive functions as such. Read the definition of Government in the General Clauses Act as amended by Order in Council. In the United Kingdom members of the Cabinet are sworn in as Privy Councillors and as such acquire executive authority In Canada also they are Privy Councillors and as such exercise executive authority (s 11) In Australia they are Executive Councillors (s 62) In the Union of South Africa also they are Executive Councillors (s. 12 of the Union Act and s 4 of the Status Act)

† Art 53

‡ Art. 51.

§ Art 52.

|| Art 53

other Ministers being members of the Council nominated by him shall retire should they cease to retain the support of a majority in the Dail, but they shall continue to carry on their duties until their successors shall have been appointed The Council is collectively responsible for all matters concerning the affairs of the State administered by them * The Oireachtas (the legislature) shall not be dissolved on the advice of a Council which has ceased to command the confidence of the majority in the Dail † The Irish Act has eliminated effectively all discretionary authority of the Governor-General,‡ a power which in the United Kingdom and the Dominions (with the exception of the Irish Free State) has provoked bitter and endless controversies among text-book writers, lawyers and statesmen

Two other points call for notice First, the right to advise dissolution appears to belong to the Executive Council as a whole and not to the President alone, although the advice of the Council may be communicated to the Governor-General by the President In actual practice, however, should any conflict as regards the matter arise between the President and his colleagues the decision will very much depend on the measure of support that the President or the rest of the Cabinet receives from the Dail It is distinct, as Dr Kohn suggests,§ from the usual English constitutional practice which enabled Mr Ramsay MacDonald as head of the Labour Government to take the initiative himself apparently in defiance of his Socialist colleagues in forming the National Government in 1931 Secondly, the right of dissolution cannot be exercised by a "Minority Government" A Government, that is, which has been decisively defeated in the Dail has no power to secure its dissolution and thus appeal to the electorate, a constitutional development, defective as it may be in other respects, which does not suffer from the English theory of what Dr. Kohn so aptly calls the "anarchical prerogative of dissolution"‖ and

* Art 54

† Art 53

‡ By Article 37 as amended by Act No 20 of 1933, the appropriation of money was not recommended by a message from the representative of the Crown It was to be recommended by a message from the Executive Council

§ Kohn *The Constitution of the Irish Free State* p 291

‖ *Ibid*, p 292

removes the Governor General from a position of political embarrassment *

The issues bearing on these topics in the rest of the Dominions and the United Kingdom are by no means free from ambiguity It is of course evident that where there is responsible government the King or his representative will appoint a Prime Minister or Premier from amongst members of the legislature who inspires its confidence and commands its support and that other Ministers will be appointed on the nomination or recommendation of the Prime Minister or Premier The question has often been raised as to whether in inviting a person to form the administration the King or his representative should in every case consult the outgoing Prime Minister and whether he has power to secure a pledge from a leader regarding policy as a condition precedent to his appointment The usual practice is for the outgoing Prime Minister to advise and for the King or his representative to act accordingly but the main consideration that must weigh with him is the position of the parties in the House to which the Cabinet is responsible In the absence of a clear majority for a party in Parliament what has the King or his representative to do in forming his Government?

In U K and Dominions the issue not free from ambiguity

In the Dominions it is not ordinarily expected that the Governor General will take any initiative, but it is an open secret that such initiative had been taken by King George V when Mr MacDonald had formed a National Government in 1931 with Mr Baldwin as the Lord President of the Council a position to which Mr MacDonald was subsequently relegated in the reconstituted Baldwin administration Dominion practice suggests however that the party leaders should consult, and that the two parties which had the greatest affinity should agree on the mode in which the Government was to be carried on until such time as circumstances should justify a fresh appeal to the

* The office of the Governor-General has been abolished and the Crown eliminated from the internal concerns of the State. Other drastic amendments have also been effected. The amendments should be read with the provisions of the original Act for proper appreciation of the issues

people "* That practice has no binding effect either on the Governor-General or the political parties, but it will shed light on the manner in which the King's Government may be carried on in India through communally elected legislatures which for some years to come may tend to give a religious or racial complexion to the parties

Pledge prior to appointment as Minister

On the question of pledge prior to appointment the Tasmanian case of 1914, in which the Governor, his Ministers, the House of Assembly and the Secretary of State for the Colonies (at present for the Dominions) were involved, will throw some light The process was set in motion when the Liberal Ministry, against whom a motion of no confidence had been adopted by the Assembly, resigned after having failed to force a dissolution upon the Governor The relevant correspondence on the subject† shows that Mr Earle was sworn in as Premier on his acceptance of the condition, besides two others, that he would advise an immediate dissolution of the House On his assumption of office Mr Earle who had the support of the majority in the Assembly intimated his refusal to abide by that condition The grounds for his refusal were set out in his letter to the Governor, Sir William Ellison Macartney, dated the 7th April, 1914

The Tasmanian Case

After having pointed out to the Governor that he commanded the confidence of the majority in the Assembly and that he had assured him that he could carry on the Government Mr Earle asserted that "the exaction of the pledge to advise a dissolution of the House of Assembly is contrary to the principles and well-established practice regulating the conduct of Parliamentary Government" He wrote further that it was the Premier's bounden duty to tender advice to the Governor as he thought right and proper and as the interests of the State called for That he could not do if he bound himself by conditions imposed by the Governor The Governor's intervention by the imposition

* Keith *Letters on Imperial Relations, Indian Reform and Constitutional and International Law*, 1916 1935, p 251

† Keith *Speeches and Documents on Colonial Policy*, Vol II, pp 126 239.

of conditions was a proceeding which was tantamount to asking the Premier to accept the responsibility of advice tendered by a defeated Minister an absurd application of the Governor s discretionary powers in a Colony enjoying responsible government

Quoting the authority of Sir Erskine May* in connection with the Grenville episode of 1807 in England Mr Earle remarked that not only is the demand of a pledge unconstitutional, but any Minister who accepts office in consequence of a former Minister having declined to give a pledge is in the same position as if he had advised the imposition of it In reply to the Premier on the 8th April 1914 the Governor expressed his general disagreement from the view taken by the former Sir William was however on firm ground when he pointed out that he had placed no pressure upon Mr Earle to accept office under the conditions referred to and that they were deliberately accepted by Mr Earle after the Governor had informed him that they could not be altered, and as deliberately accepted by the other members of the Administration In an address to the Governor dated the 8th April 1914 the House of Assembly stood by Premier Earle The question was then referred to Mr L Harcourt the Colonial Secretary who ruled that the Governor ' is no more entitled to impose on an incoming Ministry as a condition of admitting them to office that they should advise a dissolution of the Legislature than that they should tender any other specified advice A Governor is of course, entitled to discuss the aspects and the needs of the political situation freely and fully with his proposed new Ministers but he cannot go to the length of requiring them to give any particular advice as a condition of accepting their services without claiming a personal responsibility which does not attach to him

A case in Nova Scotia

Another case had occurred in Nova Scotia in 1860 which was cited in support of the Tasmanian Governor s action In that case Lord Mulgrave had refused his Ministers a dissolution on the ground that it was improper to interfere with the legal procedure of testing the validity of elections in regard

* May *Constitutional History of England* (1912) p 79

to certain members of the Assembly. Before asking Mr Young to form an administration in succession to Mr Johnstone the Governor demanded of Mr Young a pledge, which he accepted, to the effect that the law must be allowed to take its own course In Mr Harcourt's view it presented no analogy to the Tasmanian case of 1914 inasmuch as the Governor's action was only a reminder to Mr Young of a previous decision that the usual legal procedure should not be disturbed Technically, of course, Mr Harcourt was right in the view he took, but we should think that, according to the general principles of his ruling in the Tasmanian case, Lord Mulgrave's demand for an assurance from Mr Young even in respect of a previous decision was improper and perhaps unconstitutional

It is interesting to recall in this connection the resolutions which were presented to the Lords and the Commons in 1807 after the forced resignation of the Grenville Ministry It was stated in the resolutions that it was " contrary to the first duties of the confidential servants of the Crown to restrain themselves by any pledge, express or implied, from offering to the King any advice that the course of circumstances might render necessary for the welfare and security of any part of the Empire "* These resolutions (not pressed) were a reminder to George III of the limitations of his prerogative in exercise of which he had forced the resignation of his Ministers " because they refused to give the King a pledge or assurance that never under any circumstances would a measure for the relief of Roman Catholics be suggested by them to the King "† There is support for Mr Harcourt's ruling in the writings of such an authority as Sir Erskine May‡ and of such an acute legal critic as Mr Justice Evatt.§ It should be the duty alike of the Governor-General and Governors in India and their respective Ministers under the 1935 Act to conform their public conduct to the convention decisively established in 1914, although it lacks the sanction of a statutory rule

* A Todd *Parliamentary Government in England*, Vol I (1892)

† Mr Justice Herbert Vere Evatt *The King and his Dominion Governors*, p 31

‡ May *Constitutional History of England*, Vol I, pp 96 98

§ Evatt *The King and his Dominion Governors*

Another connected issue that might be canvassed is whether, and, if so, to what extent and in what circumstances, the Governor-General or the Governor is entitled to take into his confidence persons other than his constitutional advisers and form his own opinion by such mutual consultation on public questions or any questions of policy The India Act of 1935 empowers him to make rules* requiring Ministers and Secretaries to the Government to transmit to him all such information with respect to the Government as may be specified or as he may otherwise require to be so transmitted and in particular requiring a Minister to bring to his notice and the appropriate Secretary to bring to the notice of the Minister concerned and of the Governor General or the Governor, as the case may be any matter which involves any of his special responsibilities In the discharge of his functions regarding these matters the latter shall act in his discretion after consultation with his Ministers

The right to consult other than confidential advisers.

What are the implications of this section? Major Attlee interpreted it as making the Secretaries the watch dogs of the Ministers † and indicating lack of confidence in them Mr Butler on the other hand said that the law only followed the practice under the old Act and implied more or less a mode of transacting formal business of the Government It will be no different Mr Butler added from the ordinary way of business within a Government department when for instance a Secretary responsible for a particular branch of the adminitration marks the name of the Governor on a particular file to which the Governor should pay attention ‡ The section is not so innocent and innocuous as Mr Butler suggests

The role of Secretaries in India.

In one case it will be seen, Secretaries will not have to approach the Governor General or the Governor through the Ministers which means that should they so desire Secretaries may report matters to him without the consent or knowledge of the Ministers or may seek to influence a weak or

* s 17 (4) and s 59 (4)

† Commons Committee Debates (Official Report) March p 1497

‡ *Ibid* p. 1498,

inexperienced Governor-General or Governor against the Ministers and thus bring about administrative deadlocks In the other case involving special responsibilities, suppose the Minister concerned, who also is required to be informed explicitly, states that it was not a "special responsibility" matter and that the doubt, if any, should be removed by his consultation with the Governor-General or the Governor without the Secretary reporting to him, where will the Secretary stand? It will be an impossible task for him to observe the rules and at the same time to *enjoy the confidence of his Parliamentary Chief* *The section may* create opportunities of intrigue within the inner Councils of the administration, at best it would be an embarrasment to the Secretary. Nor is it clear whether the rules will apply to Parliamentary Secretaries who are expected to play no mean part in responsible government or to permanent Secretaries drawn from the Services or to both, although the section seems to be intended by the framers of the Act to apply to the latter * Moreover, it is difficult to account for the use in the machinery clause of the ponderous expression "in his discretion after consultation with his Ministers" † If the interpretation put upon the phrase "in the exercise of his individual judgment" with reference to the other sections of the Act is correct, that phrase should have been inserted instead of the clause as now appears in the section This new phraseology makes what Mr Churchill called the terms of art rather intriguing.

Mr Asquith's memorandum

As regards the Governor-General or the Governor's consultation with public men or party leaders other than his Ministers, the Act makes no provision; but if contrary to the practice in responsible government, he is to assume political responsibility for Governmental acts and measures, he should have the right also to form his own judgment and to decide in his own way how best to do so and when Much, however, will depend on the growth of conventions in this regard and

* Read the "confidential" circular issued over the signature of the Chief Secretary to the Government of Bihar and published in the Press early in December, 1937 It was withdrawn on protest by the Ministry

† s 17 (5) and s 59 (5)

the spirit in which the Act is worked on both sides and the statesmanship of Ministers and Governors The law does not specifically bar outside advice or consultation in the carrying on of the administration It may be useful to call attention here to an elaborate memorandum prepared by Mr Asquith (afterwards Earl of Oxford and Asquith) as Prime Minister in December, 1910, immediately after the general elections That memorandum laid down some important propositions as to constitutional practice, and one of the propositions was to the effect that it is not the function of a constitutional Sovereign to act as arbiter or mediator between rival parties and policies still less to take advice from the leaders on both sides with a view to forming a conclusion of his own *

It appears from Lord Lansdowne s interview with King Edward VII on the 27th of January 1911 and the former s report of his conversations with His Majesty since published that the King had controversy with Mr Asquith as to the propriety of interviews between himself and the Leaders of the Opposition † It is to be admitted that the principle emphasised by Mr Asquith was apparently departed from by King George V in 1931 in connection with the formation of the National Government, but it is evident that the King s action had the previous knowledge and support of his Prime Minister though not of some of the latter s Labour colleagues in the Cabinet ‡ Generally however, constitutional practice in the United Kingdom supports Mr Asquith s contention, and those on whom the responsibility of office under the new India Act has fallen or will fall will do well to keep that practice and Mr Asquith s proposition in view in evolving the right type of constitutional government

* J A. Spender and Asquith *Life of Lord Oxford and Asquith* p 306

† Lord Newton *Lord Lansdowne* pp 409-10

‡ In 1893-94 Queen Victoria consulted outsiders behind the back of her Prime Minister regarding plans for the ejection of her Ministry a procedure which by common consent constituted a breach of duty and of honour both on the part of the Sovereign herself and the supine statesmen who offered advice. The objection it should be noted is to advice from political rivals and not to opinions sought from or given by non political persons. The position is however different upon the resignation of a Ministry With the approval of Mr Baldwin Edward VIII consulted Mr Churchill before abdication. A Peer may seek audience and offer advice but on such an occasion the King declines to discuss and formally replies.

Dissolution of legislatures and dismissal of Ministers

The question of dissolution of legislatures and of dismissal of Ministers raises issues of an extremely complicated and delicate character In the memorandum issued in 1910 in connection with certain constitutional issues Mr Asquith emphasised apparently with the assent of his colleagues that the "general duty of the King was to act upon the advice of the Ministers who for the time being possess the confidence of the House of Commons"* whatever course might be deemed proper in the judgment of the King He added, however, that "it is technically possible for the Sovereign to dismiss Ministers who tender to him unpalatable advice"† But he qualified it by a warning that such action would be singularly unsatisfactory from the King's point of view The presumption, therefore, appears to be that Mr Asquith had in mind the Crown's common law prerogative of appointing and dismissing Ministers, a power which in the Dominions and in India has been embodied in statute It is to be noted that Mr Asquith's warning was intended to apply in those cases only where Ministers had the support of the popular House It follows, according to him, that it is absolutely in the discretion of the King to accept or reject the advice tendered by a Ministry censured or defeated in the legislature The mere holding of office, in other words, creates no right on the part of Ministers to bind the Sovereign to the course of policy recommended by them. That view was more or less expressed by the same Liberal statesman after the general elections of 1923 In discussing the prerogative of dissolution Mr Asquith said

> "It does not mean that the Crown should act arbitrarily and without the advice of responsible Ministers, but it does mean that the Crown is not bound to take the advice of a particular Minister to put its subjects to the tumult and turmoil of a series of General Elections so long as it can find other Ministers who are prepared to give it a trial The notion that a Minister—a Minister who cannot command a majority in the House of Commons is invested with the right to

* J A Spender and Asquith *Life of Lord Oxford and Asquith*, Vol I, pp 305 06

† *Ibid*, p 606

demand a dissolution is as subversive of constitutional usages as it would be pernicious to the general and paramount interests of the nation at large *

Dr Keith criticises Mr Asquith.

Note should be taken of Mr Asquith s implied objection to (i) a series of General Elections and (ii) the imposition of an obligation on the Crown to dissolve on the advice of Ministers who have forfeited the confidence of the Lower House of the legislature In other circumstances, the advice tendered by a Minister would by implication be constitutionally binding The controversy was enlivened by Professor A B Keith s somewhat contemptuous reference to Mr Asquith s opinion and his emphatic assertion that this was a dictum evidencing the statesman s obvious and regrettable decline in mental power and sense of realities † Professor Keith found support for his view in the King s grant of a dissolution to Mr Ramsay Macdonald in 1924 That dissolution was granted by the King without even considering ' according to him, whether the Government could be carried on without a dissolution ‡ It was a precedent which Professor Keith regarded as conclusive which appeared to mean that in no conceivable circumstances could the King refuse to act on the advice of his responsible Ministers Commenting in 1929 on the declaration of the 1926 Conference on the subject he toned down his attitude of hostility to the doctrine enunciated by Mr Asquith He said

> It does not mean that he (the Governor General) is deprived of all authority to refuse to act on Ministerial advice for if for instance after one unsuccessful dissolution Ministers asked him to grant another he would clearly be bound to refuse thus to violate the constitution But it means that he should save in extreme cases accept the advice of Ministers as readily as did the King in 1924 when he dissolved Parliament at the request of Mr Ramsay MacDonald without trying to find an alternative Government §

* *The London Times* Dec. 19th 1923.

† Keith *Responsible Government in the Dominions* Vol I p 48.

‡ *Ibid* p. 147

§ Keith *Dominion Autonomy in Practice*

The Imperial Conference formula

The formula evolved by the Inter-Imperial Relations Committee (the Imperial Conference of 1926) stated *inter alia* that "it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain " It follows, therefore, from Professor Keith's construction of the Conference formula that (*i*) in matters relating to dissolution of the legislature and the cognate problems the position of the Governor-General is analogous to that of the King, and (*ii*) if there are discretionary powers of the Governor-General, they are not different from those inherent in the King by his common law prerogative * According to Professor Keith's view expressed in 1929, some measure of discretion exists in exceptional circumstances both in the United Kingdom and in the Dominions, and one of those extraordinary cases indicated is a Ministerial request for dissolution almost immediately after an unsuccessful dissolution In other circumstances, the hands of the King or his representative are tied and Professor Keith suggests, on the authority of the 1924 precedent, that the King or his representative's compliance with his Minister's request must be automatic so that there would be no warrant in constitutional practice for his trying to find an alternative Government It is, however, difficult to say how Professor Keith gathered that the King in 1923 had not at all examined the possibilities of carrying on without Mr Ramsay MacDonald All that can be said is that it is not safe to give an objective interpretation to a subjective phenomenon People outside the court circle simply knew not how King George's mind worked in the face of what threatened to develop into a constitutional crisis

The Byng episode in Canada

A crisis came in June, 1926, in the Dominion of Canada when as a result of Lord Byng's refusal of a dissolution Mr Mackenzie King resigned There

* Read Dr Jennings's *Cabinet Government*, Chap XII, pp 299 305.

are certain important facts bearing on the issue which call for notice Mr King asked for dissolution when a motion of censure on his Government was pending arising out of alleged irregularities in the Customs Department The Governor-General might have been led to think that Mr King s request was a device to evade the issue an inference which was as vehemently urged by the Opposition as it was strenuously repudiated by the Prime Minister Contrary to the whole course of action since the formation of the Dominion in 1867, * Mr King s request was refused and Mr Meighen was commissioned The new Prime Minister alone formally accepted office the other members of his administration being appointed to acting posts The Commons recorded their lack of confidence in the Ministry which was irregularly constituted The House was prorogued Throughout the period the Ministry which did not command the confidence of the Commons spent large sums of money without legal sanction Mr Meighen then asked for dissolution which was granted, and the result of the elections was a decisive defeat for Mr Meighen and Mr King s return to office

A challenge to the doctrine of equality

The episode shows the danger involved in the exercise of discretionary authority by the Crown s representative There was one defect in Mr King s tactics and it was his deliberate refusal to face a motion of no-confidence otherwise the whole weight of usage and tradition was on his side and against Mr Meighen and Lord Byng In the course of a Canadian Press message Professor Keith remarked that Lord Byng in refusing the dissolution of Parliament advised by the Rt Hon ble Mackenzie King, has challenged effectively the doctrine of equality in status of the Dominions and the United Kingdom and has relegated Canada decisively to the Colonial status which we believed she had outgrown He then proceeded to point out that the action was subversive of the status acquired since the 1911 Imperial Conference when the Dominions first appeared on equal terms with the United Kingdom and contrary to the practice established since that year in South Africa and New

* Keith : *Speeches and Documents on the British Dominions* 1918-31 Introduction xxiii; *cf* Mr King s speech at Ottawa dated 23rd July 1926

Zealand.* The issue was clarified in 1926 and again in 1930† so that it is expected of a Dominion Governor-General to act as the King would act in the United Kingdom in similar circumstances. Any departure from British practice may not be illegal but would be thoroughly unconstitutional.

Mr Bruce granted dissolution

The two cases in the Australian Commonwealth, in which the power of dissolution was exercised after the Imperial Conference of 1926, are interesting. In 1929 the Maritime Industries Bill sponsored by the Bruce Government was amended in Committee. The Opposition urged in their amendment that the Bill should not be given effect to until submitted to a referendum or election. Mr Bruce advised against referendum and asked for dissolution. He assured the Governor-General that he would ask Parliament "for the necessary financial provision to carry on the public services until after the election has been held."‡ Lord Stonehaven accepted the Prime Minister's advice but took care to stress that the dissolution was granted in view of the assurance. In Mr Justice Evatt's opinion, no inference could be drawn from that dissolution inasmuch as the Assembly, which was only ten months old, by its own vote, indirectly forced its dissolution.§ But no attention was paid to the doctrine of the "Parliamentary situation," namely, that no dissolution should be granted before the possibilities of an alternative Ministry had been exhausted. What, however, is of special importance is the fact that the Governor-General left the issue in doubt as to what he would have done had not a guarantee in respect of financial provision been given by the Prime Minister.

Sir Issac Issacs relies on the Conference formula

The second case occurred in November, 1931, when Mr Scullin obtained a dissolution from Sir Issac Issacs. The Governor-General observed that it was his duty to accept the advice tendered by his Prime Minister "in view of

* Keith. *Speeches and Documents on the British Dominions*, pp. 152-53.

† *Ibid*, pp. 221-22.

‡ Commonwealth Parliamentary Debates, September 12th, 1929, p. 829.

§ Evatt. *The King and his Dominion Governors*, p. 235.

the present constitutional position of the Governor General of a Dominion, as determined by the Imperial Conference of 1926, confirmed by that of 1930 * Whether the view thus expressed by Sir Isaac was correct or not—and he cited the authority of Professor Keith in support of his action—he introduced an element of uncertainty when he referred to the strength and relation of various parties in the House of Representatives and the probability in any case of an early election being necessary † as affording further justification for his immediate response to Mr Scullin Suppose the circumstances were different would he then have been justified in disobliging Mr Scullin? If not what was this reference to the probability of an early election, etc for? If so, what was the need for citing the authority of Professor Keith and calling attention to the Imperial Conferences of 1926 and 1930?

An Australian State Governor recalled

The two important incidents in the constitutional history of New South Wales in Australia may be referred to in connection with the reserve powers of a State Governor in a self-governing Dominion namely, (*i*) the Strickland Holman crisis of 1916 resulting in the recall of the Governor and (*ii*) Sir Philip Game s dismissal of the Lang Ministry in 1932 In 1916 Mr Holman was the Premier of New South Wales and Sir Gerald (afterwards Lord) Strickland was the Governor A no-confidence motion against the Ministry was tabled to which Mr Wade the Opposition leader proposed an amendment The substantive motion was lost but the amendment which proposed to set up a National Party with a programme based on broad democratic lines was accepted It appears that the Assembly refused to declare its confidence in the Ministers Mr Holman then came to an agreement with Mr Wade as regards the formation of a national party and extension of the life of the Assembly Sir Gerald refused to consider the proposal on the ground that Mr Holman had received the Governor s commission on the strength of his being the leader of a Party (*i e* the Labour Party) whereof the majority had now expressed its want of confidence Mr Holman rightly

* Commonwealth Parliamentary Debates Vol 123 November 25th p 1926
† *Ibid* November 26th 1927

interpreted it as a demand for resignation, and instead of returning his commission he immediately put himself in touch with the Colonial Office with the result that the Governor was recalled.

The dismissal of Premier Lang

In May, 1932, when Sir Philip Game dismissed Mr. Lang the latter was in a commanding position in the Assembly,* though in a minority in the Upper House. In approving generally of the Governor's drastic action Professor Keith wrote:

> "So long as Mr. Lang kept within the limits of the law, it would have been unwise for the Governor to act against his advice. But when Mr. Lang deliberately defied the legislation of the High Commonwealth after it had been declared valid by the Court, and continued to issue illegal orders to the servants of the Crown, the Governor had no alternative but to require him to withdraw these orders, and, on his refusal to do so, to remove him from office."†

Professor Keith's disapproval of Mr. Lang's so-called "illegal" action had reference to the Premier's earlier activities and not to his Mortgage Taxation Bill and the Commonwealth Financial Emergency (State Legislation) Act of 1932. The latter measure was avowedly intended by the Commonwealth to counteract Mr. Lang's proposed Mortgage Taxation Bill and was not judicially tested. The issue then immediately facing the Federal Government and the State raised complicated problems of jurisdiction, and Professor Keith was perhaps not strictly fair when he found Mr. Lang guilty of having committed illegalities unless he confined himself to the earlier period of the controversy and the High Court's decisions in favour of Commonwealth legislation in April, 1932, and Mr. Lang's attempt to counter those decisions by administrative action.

* At the time of his dismissal Mr. Lang had 55 supporters in a House of 90 while Mr. Stevens, the Opposition leader, had about 20. Mr. Stevens received the commission and was granted a dissolution. The General Election returned him to power. The position would have been exceedingly delicate, perhaps untenable for the Governor, had the electoral verdict been different. The dismissal of a Ministry while it commands the confidence of the legislature is fraught with grave risks. It is a step which no Governor should take save in circumstances in which no alternative is conceivably open to him.

† Keith, *Letters on Imperial Relations, etc.*, p. 289.

Sir Isaac Isaacs's ruling

These two cases provide interesting lessons In the former case, a Governor was recalled, although his intention was to force an appeal to the electorate against a Ministry whose political manoeuvres had not been backed up by an electoral mandate In the latter case, the Ministry was dismissed on the ground of its alleged illegal acts although it had the support of the Assembly It was open to the Governor to have the alleged illegalities rectified by decisions of Courts a method of adjustment which should have been adopted instead of the drastic action that Governor Game took with impunity Despite Professor Keith s strong view as to the doctrine of illegality expressed with reference to the Lang case we feel inclined to subscribe to Sir Issac Issacs s ruling on the Australian Senate s opposition to certain executive regulations in 1931 The Governor General declared that with respect to legality it is obviously my duty to take the only course which would enable the proper tribunal for that purpose the judiciary, to determine the question should it arise * It is not fair to leave questions of law to be decided by the Governor General or the Governor nor is it safe to do so for the obvious reason that all Governors-General or Governors are not properly equipped for the purpose As a general rule, the Governor General or the Governor should seek legal opinion from his Attorney General and act on the advice of his responsible Ministers thereby rendering it possible for the competent judiciary to pronounce upon the legality or otherwise of a Ministerial action †

Legal liability of Governors in Dominions

This brings us to the question of the criminal or civil liability of the Dominion Governor-General or State Governors and Provincial Lieutenant-Governors for public acts which makes non interference with Ministerial actions somewhat complicated The old maxim that the King can do no wrong gives the Crown legal as well as political immunity In the United Kingdom responsibility constitutionally belongs to Ministers

* Commonwealth Parliamentary Debates June 18th 1931 p 2596.

† An interesting chapter on this question is given in Mr Justice Evatt s *The King and his Dominion Governors* pp. 175-91.

and, in law, to them or to those public servants also who carry out their orders. No such immunity is accorded to the Dominion Governor-General or Governors and Lieutenant-Governors who are civilly and criminally liable in Courts of the territory for illegal acts, public or private, and hence the 1926 doctrine of equality or similarity reaffirmed in 1930 loses much of its value The position is anomalous

Two Imperial Acts* provide for punishment for crime or misdemeanour by Colonial Governors, and there is nothing to suggest that they do not apply to Dominion Governors-General or Governors notwithstanding the new meaning of Dominion status as a concept in the constitutional law of the Empire Equally effective against them in law is the Imperial Act of 1861 which is directed against murder committed by a British subject overseas Having regard to the status of the Dominions and the position of the Governor-General defined at the Imperial Conferences of 1926 and 1930, there is absolutely no reason why the legal liability for official actions should not be removed and complete immunity, in the United Kingdom or the Dominion concerned, should not be extended to them as is enjoyed by the Crown So long as this necessary reform is not effected the Dominion Governor-General may feel tempted to ignore the formula of equality and exercise his discretionary powers against his Ministers at least to ensure his own legal protection despite the present practice that the appointment of the Governor-General is subject to the approval of the Dominion concerned

Difference in status between Governor-General and Governors or Lieutenant-Governors ?

While very properly advocating legal protection both for Governors-General and State Governors or Provincial Lieutenant-Governors Professor Keith remarks that the resolutions of the Imperial Conferences of 1926 and 1930 do not extend to the latter † He points out, however, that although the States of Australia and the Canadian Provinces are not subject to the rule laid down in 1926, " practice there tends to be assimilated

* 11 and 12 Will 3 c 12, 42 Geo 3 c 85

† Keith *The Constitutional Law of the British Dominions*, p 142

to that in the Dominions as in the case of the dissolution granted in 1932 to the acting Premier of Victoria on the defeat of the administration in the Lower House * Reasons suggested for the doctrine of inapplicability to States or Provinces of the formula are (*i*) that the resolutions do not specifically deal with them thereby lending support to the presumption that the position of Governors or Lieutenant-Governors was left where it had always been and (*ii*) that they are still required to act as the agents of the Imperial or Dominion Governments †

Mr Justice Evatt devotes a whole chapter in his recent work to refuting Professor Keith s thesis ‡ His answer to the distinguished scholar is twofold He asserts that the non inclusion of States and Provinces in the proceedings of the Imperial Conferences does not by itself diminish their constitutional status § They were not represented at those Conferences because generally since 1911 they had not been concerned with questions relating to foreign and external affairs which under the Dominion and Commonwealth federations were outside the jurisdiction of the constituent units They were as it were caught napping in 1926 and 1930, and when certain constitutional conventions were proposed to be elevated to the rules of formal enactment subsequently incorporated in the Statute of Westminster 1931 they came to realise their position and asserted themselves in the relevant discussions of Imperial and Dominion statesmen ||

The position in Canadian Provinces.

Strictly speaking on this issue Professor Keith seems to be on firm ground In view of the heated controversy on the Byng episode in Canada and Mr Mackenzie King s express intention to raise the issue in the then ensuing Imperial Conference non participation by States or Provinces in the discussions that followed may be interpreted as their deliberate refusal to get the position of their Ministers *vis-a vis* their Governors or

* *Ibid* p 151-52

† *Ibid* p 160

‡ Evatt *The King and his Dominion Governors* Chap XXII pp. 201 16

§ *Ibid* p 202.

|| *Cf* Ss. 7 and 9 of the Statute of Westminster 1931.

Lieutenant-Governors clarified It was a lapse and for that the responsibility belongs to them If, therefore, the formula of equality evolved at the Conferences had any constitutional value, it was, by clear implication, intended for the Dominions and not for States or Provinces But when Dr Evatt refers to judicial decisions as defining the status of Federal units in the Dominions he appears to make a convincing case Thus in *Liquidators of the Maritime Bank of Canada* v *Receiver-General of New Brunswick* Lord Watson remarked

> 'A Lieutenant-Governor when appointed, is as much the representative of His Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government '*

Lord Watson's view was quoted with approval by Lord Haldane in 1916 in *Bonanza Creek Gold Mining Company Ltd* v *Rex* His lordship said

> 'Whatever obscurity may at one time have prevailed as to the position of a Lieutenant-Governor appointed on behalf of the Crown by the Governor-General has been dispelled by the decision of this Board in Liquidators of the Maritime Bank of Canada *v* Receiver-General of New Brunswick "†

In 1924 in *Attorney-General for Ontario* v *Reciprocal Insurers* Mr Justice Duff, speaking for the Privy Council, declared .

> " And indeed to hold otherwise would be incompatible with an essential principle of the Confederation scheme, the object of which, as Lord Watson said in Maritime Bank of Canada *v* Receiver-General of New Brunswick, was 'not to weld the Provinces into one or to subordinate the Provincial Governments to a central authority ' 'Within the spheres allotted to them by the Act, the Dominion and the Provinces are ' as Lord Haldane said in Great West Saddlery Coy *v* The King, 'rendered in general principle co-ordinate Governments "‡

* A C 437 at p 443 (1892)
† A C 566 at pp 580 01 (1916)
‡ A C 898 at pp 542 43 (1924),

In 1914 in *Attorney General for the Commonwealth of Australia* v *Colonial Sugar Refining Co* Lord Haldane enunciated the same general principle of co-ordinate authority with reference to the States of Australia * Mr Justice Evatt is correct in pointing out that the maxim laid down by some Australian judges that the States of the Commonwealth are not sovereign States † has given rise to a measure of confusion of thinking It does not however mean as he suggests, that the Commonwealth itself possessed sovereignty to the exclusion of the States ‡ The doctrine of sovereignty was explained at length in *New South Wales* v *Commonwealth of Australia* in which we find it emphatically stated that the subjection of the States to the jurisdiction of the High Court is accompanied by a perfectly equal and undiscriminating subjection of the Commonwealth to the same jurisdiction For all purposes of self government in Australia sovereignty is distributed between the Commonwealth and the States § As to the Canadian Provinces a like view was expressed in 1932 by Lord Atkin speaking for the Privy Council in *Lymburn* v *Maryland* ‖ Judicial opinion therefore seems to accord the same position to State Governors and Provincial Lieutenant-Governors *vis-a vis* their responsible Ministers as is enjoyed by the Dominion Governors-General in relation to their Ministers and it is unfortunate that such a careful thinker as Professor Keith should not have given due weight to this aspect of the problem in his examination of the constitutional status of the Dominions and their constituent units

The position in Australian States

But that there is some room for confusion as to the Canadian Provinces must be admitted in view of the provisions of Ss 58 and 59 of the British North America Act under which Lieutenant-Governors are appointed by the Dominion Governor General in Council and hold office during the pleasure of the Governor

Confusion in Canadian Provinces

* A C 237 at p 254
† *Commonwealth of Australia* v *State of South Wales* (1923) 32 C L.R. 200
‡ Evatt *The King and his Dominion Governors* p 206
§ 40 C D R. 155
‖ A.C. 318 at p 326

General * The Dominion power of disallowance of Provincial legislation is another vital factor in the situation Since the inauguration of the Federation two Lieutenant-Governors have been dismissed by the Governor-General in Canadian history Professor Kennedy thinks that the earlier view that Lieutenant-Governors were mere creatures of the Dominion Government has been abandoned and reliance in support of his contention is placed on the judicial decisions already cited.† Strictly from the legal standpoint, perhaps they are not enough, and the law as it exists should be modified in accord with judicial opinion Nor can the disallowance procedure be justified in its present legal form There are authorities who have no objection to the principle of disallowance as such when a constitutional issue involving jurisdiction arises, but, as Professor Kennedy remarks, "it would be safer if the decision in such cases were left to the courts as in the United States, since in a federation differences on constitutional law must frequently arise "‡

An element of legalised anarchy

There are so many conflicting authorities on the question of reserve powers that one is led to Dr Kohn's conclusion apparently approved of by Mr Justice Evatt that an "element of legalised anarchy characterises certain features of the Dominion (and British) constitutions "§ Where these powers rest students of constitutional law know, how and when and to what extent they may be exercised against responsible Ministers no one can generalise with anything like precision Certain tendencies are, however, clear, and in order that all doubts may be removed Mr Justice Evatt suggests the formulation of those tendencies in the formal rules of positive law There is obvious danger in such definition of reserve powers

* Mark the difference in language of the two sections "The Governor General in Council" is to be construed as the Governor-General acting on the advice of his Ministers But in actual practice no distinction is observed as between the "Governor-General in Council" and the "Governor-General" so far as these sections are concerned

† W P M Kennedy *Essays in Constitutional Law*, pp 42 43

‡ *Ibid*, p 43

§ Evatt *The King and his Dominion Governors*, p 151, Kohn, *The Constitution of the Irish Free State*, p 292.

of the Crown and its representatives * In the United Kingdom itself the emergence of a third party has complicated matters so that as recent events have shown, the party leaders sometimes look to the Crown for advice and help, if not for intervention In the Dominions and their constituent units, apart from so many party alignments there are acute religious and racial conflicts which affect to some extent the perspective in which the doctrine of Ministerial responsibility has so long been viewed in the United Kingdom In India the position of the States in the proposed Federal Scheme and communal electorates both for the Federal Centre and the provinces have complicated the problem to an extent unprecedented in British or Dominion history

Reserve powers in India

Under the Government of India Act, 1935 the reserve powers of the Governor General and the Provincial Governors have been defined, and in law there is little doubt as to their implications Many of those powers detract from what has traditionally been known in the United Kingdom and the Dominions as responsible government Some of them are unnecessary and perhaps offensive, many of them betray lack of confidence and trust in responsible Ministers The exercise of those powers is likely to provoke conflicts between the King's representatives and their constitutional advisers in the actual administration of affairs In view of the fact that the Act has deliberately thrown responsibility, both legal and constitutional, on them the judicial immunity guaranteed to them is something which they do not deserve Where there is power to take a certain independent decision there should be liability attaching to it While it is necessary in the Dominions to give the Governors† complete immunity in respect of public acts there is need for judicial control of the discretionary or special powers of the Governor-General or Governors in India unless of course the latter are compelled to conform to standards of responsible government which at present obtain in the United Kingdom and the Dominions

* Read Professor Keith's letter dated 8th July 1936 on The Reserve Powers of the Crown in which an attempt has been made to counter Dr Evatt's thesis

† The term Governor is used here for the Governor-General the State Governor or the Provincial Lieutenant-Governor

The provisions of the 1935 Act are, therefore, unsatisfactory And what are they like? No proceedings will lie in, and no process will issue from, any court in India against the Secretary of State, the Governor-General and the Governors, whether in a personal capacity or otherwise, in respect of any act or omission * This immunity will remain on or after their retirement from office provided that proceedings may be started in India against them on or after their retirement with the previous sanction of His Majesty in Council, a proviso which is of dubious value Nothing, however, in this section in any way restricts the right of any person to start proceedings against the Secretary of State, the Federal Government or a Provincial Government in respect of matters set out in Chapter III of Part VII of the Act which deals with property, contracts and suits It is not clear from the section if the immunity in India extends to personal actions, unconnected with official duties, *e g* , a private debt, assault or murder As Professor Keith says, "if so, the exemption is probably greater than that enjoyed by the Lord Lieutenant of Ireland."† At English common law the Governor of any territory within His Majesty's allegiance is liable to an action for damages both in a court of the territory concerned and in the court of the King's Bench in England ‡ Sec 306 of the present India Act, therefore, eliminates the common law rule in so far as the proceedings in Indian courts against the officers named therein are concerned The jurisdiction of the King's Bench, however, is not ousted

Legal immunity in India

The protection given to Ministers under Sec 110 of the Government of India Act is removed while immunity is justly accorded to Presidents or Speakers or other officers of legislative Chambers in India in respect of the exercise by them of powers vested in them for regulating procedure or the conduct of business or main-

Difference between the two Acts

* s 306

† Keith *A Constitutional History of India*, p 251

‡ *Cf Hill* v *Brigg* (1841, 3 Moo P C C 465), *Mostyn* v *Fabrigas* (1774, 20 Stat Tr. 81), *Musgrove* v *Pulido* (1879, 5 App Cas 111)

taining order in those Chambers * Equally welcome is the removal of protection against judicial proceedings by means of an order in writing of the Governor General in Council for action taken against any person save a European British subject as provided for under Sec 111 of the old Act On the other hand, the repeal of the provisions of Sec 124 of that Act, which made any person holding office under the Crown in India liable for misdemeanour (as defined at length in the section) is a retrograde step It follows that Governors General and Governors may be punished for misdemeanour only by the Court of the King s Bench under the joint operation of the Governors Act, 1699 (11 and 12 Will III c 12) and the Criminal Jurisdiction Act 1802 (42 Geo III, c 85), and for murder or manslaughter under the Offences Against the Person Act, 1861 † Generally in these days those provisions are countered by local Indemnity Acts as was done in the case of Eyre s drastic repression of a rising in Jamaica The Jamaica precedent has been regularly followed to protect Governors against claims after periods of martial law In the circumstances it is too much to expect that those Imperial Acts may be effectively invoked against Governors General or Governors in India who may have misbehaved

IV *Religious Neutrality*

Mankind have since early ages fought stubbornly and with the greatest determination for their religious rights In no other matter are they so sensitive as in regard to questions relating to their faiths The earlier European Treaties as we have seen were concerned naturally more with safeguards for the religious rites and observances of minorities than with any other problem of minorities protection In modern times new problems have arisen such as those relating to Parliamentary representation, appointment to Public Services devolution of political power, the use of minority languages etc but the question of full and complete religious protection still claims its share of attention

* Ss 41 (2) and 87 (2) of the 1935 Act

† *Cf* Governor Wall s case at the Old Bailey (1802) *R* v *Eyre* (1868); *Phillips* v *Eyre* (1870)

Religious neutrality guaranteed in Proclamations and Acts

In India when the East India Company came to enjoy political power they saw that the first thing necessary was to guarantee to the various communities free enjoyment of religious freedom The Charter Act of 1833 prohibited disabilities in respect of admission to public employments on account of religion, descent or colour * It also imposed upon the authorities the obligation of providing for the protection of the "natives" from insult to, and outrages on, their religious opinions or convictions † On her assumption of the charge of administration from the East India Company Queen Victoria issued a Proclamation in 1858 in which she laid down as the fundamental principle of conduct for her agents in India absolute neutrality in religious matters The relevant paragraph in the Proclamation has already been quoted in *extenso* ‡ Her successors have also enjoined on their agents and officers in India the scrupulous observance of religious neutrality. It has also been provided in statutes that there shall be no disability imposed on His Majesty's subjects domiciled in India in respect of admission to offices under the Crown in India on grounds of religion, place of birth, descent, colour or any of them § But are all these sufficient for the purpose when the machinery of government has been or is going to be transferred from the bureaucracy to the representatives of the people? And is not some sort of discrimination observed even now despite the Royal Proclamations?||

Existing provisions not adequate

Apparently, a large section of the people would not be satisfied unless in the constitution were incorporated effective safeguards for the protection of religious rites and observances The Congress

* Cl 87

† Cl 85

‡ Chap XVI, *supra*

§ *Cf.* s 96 of the Government of India Act and s 298 of the Government of India Act, 1935 Under the latter statute His Majesty's subjects domiciled in India cannot be prohibited on any grounds specified in the section from acquiring or disposing of property or carrying on any occupation, trade, business or profession in British India

|| Proclamations, strictly speaking, have not the force of law Compare the maxims laid down by Coke in the famous case of *Proclamations* [1611, 12 Co Rep 74 K & L 63] The King's business is to enforce the existing law, and his prerogative is under the law and subject to the control of Parliament

scheme, for instance, proposed that the article in the constitution relating to the Fundamental Rights should include a guarantee to the communities concerned for the protection, among other things, of the profession and practice of religious endowments * The Minorities Pact made it clear that full religious liberty, that is, full liberty of belief, worship, observances, propaganda, associations and education shall be guaranteed to all communities † The Hindu Mahasabha also insisted on a provision being embodied in the constitution for the full protection of religious and personal laws of the different minorities ‡

Special provisions in European countries.

It has been pointed out in Chapter IV that the European Minorities Treaties have not only laid down the broad and general principles of freedom of religious worship and observances for the benefit of all classes of citizens but have also made special provisions where necessary for a particular religious community or communities Special safeguards have been guaranteed to the Jews in Poland by Article 11 of the Polish Minorities Treaty For instance, they cannot be made to perform any act which constitutes a violation of the *Sabbath* Nor can any disability be imposed upon them for their failure or refusal to attend Courts of law or perform any legal business on the *Sabbath* Poland binds herself not to order or permit elections general or local to be held on a Saturday nor can registration for electoral or other purposes be compelled to be performed or executed on that day of the week §

The need for further clarification in India.

According to the present system in India in determining the number of public holidays the legitimate claims of the religious communities are as a rule taken into consideration We think however that the general principles of religious freedom should be incorporated in the charter of Fundamental Rights and that the proper authorities should be asked to make

* Cl 1 (A)

† Cl 8.

‡ Dr Moonje's supplementary note placed before the Round Table Conference (2nd session, 7th September 1931 1st December 1931)

§ Chap. IV *supra*.

regulations for the protection of the rights of each religious community in accordance with the principles laid down. It should be made definitely clear that no elections, general or local, shall be allowed to be held on any day or days connected with the religious performances of any community. It must be understood that such a day or days should be declared a public holiday or holidays. Further, it is necessary to provide that religious bodies and institutions should have power to regulate and administer their internal affairs independently, subject to the preservation of law and order in the country, that the property and rights of such bodies and institutions should be maintained intact and that the missionaries attached to them should have the right of entry into the army, prisons and hospitals for the purpose of promoting the spiritual advancement of their members or inmates.*

Cow slaughter and music before mosque

It will perhaps not be out of place here to refer to the practice of cow-killing and to the question of music in front of mosques. A large number of Hindu-Mahomedan riots that have occurred in recent years in India are mainly due to bitter controversies over these questions. It is well-known that Hindus by tradition hold the cow in veneration. To them it is a religious duty to give it protection and keep it in comfort as far as possible. Mahomedans, on the contrary, entertain no such feelings of affection or veneration for the cow. To them it is no more and no other than a beast which mankind require as much for agricultural purposes as for the purposes of slaughter for their consumption. Moreover, Mahomedans generally have learnt to associate the slaughter of cows with some of their religious ceremonies. It is not surprising, therefore, that riots sometimes take place in areas or districts of a mixed population of Hindus and Mahomedans. There are Hindus whom nothing short of complete prohibition of the slaughter of cows will satisfy. There are Mahomedans also who delight in the parading of cows destined for slaughter through public thoroughfares in a flaunting manner, deliberately designed to

* Chap. VIII, *supra*. Read the Government's reply to questions put on the subject in the Bengal Legislative Council, 1933, by Mr. Hassan Ali.

wound the feelings of their Hindu neighbours These exeremes cannot meet, and when they meet they produce friction

In the interests of the entire community it is necessary to cultivate a spirit of accommodation Hindus must realise that much as they may venerate the cow it is impossible for them to prohibit cow killing altogether in a country which is inhabited by peoples of diverse races and professing different religions Mahomedans in their turn must realise that they cannot afford, without embittering relations between them and their Hindu neighbours and disturbing the peace of the land to indulge in cow killing for the pleasure of hurting the feelings of the Hindus The Government as well as the local public authorities have also a responsibility in the matter In many cities municipalities have provided against the slaughter of cows in places not licensed for the purpose

A plea for co-operation

Sir P S Sivaswamy Aiyer is of opinion that it is necessary to prohibit the slaughter of animals whether in public streets or places in such a manner as to be open to the public view, even though it may be made inside a mosque so as to offend the feelings of passers by or the people in the neighbourhood * Sir Sivaswamy s proposal is open to the objection that it is likely not only to affect the existing rights of Mahomedans but also to interfere by necessary implication with religious customs and usages of a certain section of Hindus There are areas where Mahomedans have established the right of slaughtering cows even though the slaughter may be open to the public view It will not be fair to compel Mahomedans in such places to give up this right Nor is it desirable to insist on a particular method of cow killing in a Mahomedan mosque Inside the mosque Mahomedans should have ample freedom to slaughter cows in any way they like As we have indicated above the demand for the prohibition of slaughter of animals in places open to the public view will constitute an encroachment on the rights of Hindus also who sacrifice goats and buffaloes on certain ceremonial occasions What seems to us reasonable in the circumstances is that while there should be no interference

* Aiyer *Indian Constitutional Problems* pp 314-15

with the existing rights and privileges of places of Hindu or Mahomedan worship, special care should be taken when new rights are sought to be created in this regard either by Hindus or by Mahomedans It is also desirable that except in the case of temples or mosques which must be allowed to observe their old customs and usages, laws should be promulgated with a view to prohibiting the slaughter of animals in places not licensed for the purpose Here is a field for co-operation between the police, the local public authorities and the general public

The Salem Riots Case

The *practice of playing music in front of mosques* has also led to acute troubles In this matter, however, judicial decisions have in certain cases sought to clarify the issues involved The law regarding this question has been very clearly laid down by the Madras High Court in what is known as the Salem Riots Case,* so far as Southern India is concerned That High Court has held that there is no justification for a rule restricting the right of procession in the neighbourhood of a place of worship, except during the appointed hours of congregational worship To this ruling a section of Mahomedans have replied that although there are certain primary hours of worship in mosques, persons, who for some reason or other are unable to join during these hours, are permitted and required to perform their prayers in mosques during all the remaining hours of the day. This contention was anticipated by the Court and has been very justly negatived in the Salem Case, and the principle underlying the decision of the Madras Full Bench has been approved by the Judicial Committee of the Privy Council in a well-known Aligarh Case † It has further been held in the Salem Case that the contention is untenable that, irrespective of the question as to whether public worship is actually going on, the sanctity of a place of worship requires that persons passing that place should cease playing music of any kind The Privy Council has upheld the right of persons belonging to any religious community to conduct religious processions through public thoroughfares, subject to

* *Sundaram Chetti* v *The Queen*, (I L R 6 Madras 203)
† *Manzur Hasan* v *Muhammad Zaman* (I L R, 47, Allahabad 151),

the condition that they shall not interfere with the ordinary use of those thoroughfares by the public, and subject to such directions as the magistrates may lawfully give to prevent the obstructions of these thoroughfares or breaches of the public peace There should be no prohibition of the playing of music at times other than the periods set apart for congregational worship, except where there are long standing usages to the contrary

An Allahabad Case.

There is another important judgment bearing on the point at issue In this case the question of the right of performing worship at a temple or a mosque with the accompaniment of loud music was raised on appeal before Mr Justice Mookerjee and Mr Justice Bennett of the Allahabad High Court The appeal was preferred by certain Hindus against the judgment of the Sessions Judge of Bareilly The facts of the case are that in the town of Senthal in the district of Bareilly in the United Provinces there was a mosque built a long time ago and that at a very short distance from the mosque a Hindu temple was subsequently constructed The plaintiffs brought the suit before the lower court for declaration to the following effect (*a*) that it might be declared that the plaintiffs and other Hindus were competent to perform worship of Sri Thakurji Moharaj and other deities installed in the temple by blowing conches and by ringing other religious musical instruments without restriction and celebrate the usual festivals according to the old practice and rites and (*b*) that a perpetual injunction should be issued restraining the defendants, Karamat Husain and others from interfering at any time with the plaintiffs prayers

The Sessions Judge granted a declaration to the following effect First Hindus should be allowed to have music in their temple whether it was a private or public place of worship at any time except during the five recognised periods of congregational worship of Mahomedans Secondly music should not be played before mosques and *imambaras* during Mahomedan prayer times It should not be played at all during the first ten days of Moharrum or on the fortieth day

On appeal the High Court ruled that the plaintiffs both in their individual capacities and as members of the Hindu com

munity have (*a*) the right to take out religious and social processions accompanied by music along public roads even while passing mosques, and (*b*) the right to perform worship in Thakur-dwara in Senthal accompanied by music, subject in both cases to any orders or directions issued by the magistrates or the police for preventing the breaches of peace or obstruction of thoroughfares or for other matters mentioned in Section 144 Cr P C provided that such rights as stated in (*a*) and (*b*) do not amount to a nuisance defined or specified by law Mr. Justice Bennett observed that both Hindus and Mahomedans should have the right to carry on their worship, Mahomedans in their mosque and Hindus in their temple, unrestricted each by the other so long as the civil rights of the parties were not encroached upon

Mr. Justice Bennett's observation should, in our considered judgment, be the guiding principle of legislation or administrative action with regard to the question of playing music before mosques There should be no undue interference with the customs and usages of a religious community But the question of respecting these customs and usages has introduced difficulties in certain places Cases have occurred in which it has been shown that a certain community has created claims to protection by the police or by the executive by intimidating a rival community and defying the police, where possible In such cases the problem should be solved by considerations of general expediency and in accordance with the principles of justice and fairplay

A principle of English Law.

The problem is one which depends for its solution on the vigilance and impartiality on the part of the executive and the police The magistracy must protect civil rights of the communities established by competent courts Sometimes it has been found that magistrates follow the easy method of interdicting by orders the exercise of legal rights on apprehension of a breach of the peace We are prepared to admit that in exceptional cases when there is an imminent danger of the disturbance of the peace, they should have power to prohibit even the exercise of any legally valid right But there must be some limit to the exercise of this power, for the repetition of prohibitory orders by the magistracy is bound to create an impression that the authorities are

powerless to protect the people in the exercise of their civil rights against violent or unwarranted attacks The magistracy should follow the sound principle of English law that it is their first duty not to prohibit the exercise of legitimate rights but to restrain those who are out to interfere with the exercise of those rights In a recent case to which reference has been made in a previous Chapter the Chief Presidency Magistrate of Calcutta took a sound and correct view of the law

Where it is necessary to ascertain the hours of congregational worship of a religious community for the purpose of regulating the exercise of religious rites by a rival community, magistrates should in the first instance, seek for relevant information from the community concerned And if it refuses to give the required information the police or the magistracy must fix certain hours for congregational worship according to their own lights When the rights have been ascertained and the hours fixed there should be no hesitation on the part of the authorities to protect the parties in the enjoyment of their respective rights

The Nizam s gesture

As regards the creation of new places of public worship for any religious sect, it is necessary that the Government should exercise some measure of control In the States of Mysore, Cochin and Hyderabad the previous sanction of the Government is essential to the construction of new buildings for public worship That rule has served to prevent communal riots to a considerable extent and the newly constituted Provincial Governments would do well to adopt and enforce it in their respective provinces His Exalted Highness the Nizam of Hyderabad gave striking evidence of his breadth of outlook and catholicity of spirit by issuing a warning in a *Firman* in January 1935, to religious preachers within his dominion to refrain on pain of penalty from uttering sermons or words which even by implication might cause provocation to the people of other religious sects Governments in British India might profitably take a leaf out of the Nizam s book in this matter In this connection attention may be drawn to an interesting and illuminating article contributed by Sir P S Sivaswamy Aiyer to the July number of the *Hindusthan Review*, 1926, extracts from which embodying the learned author s detailed sugges-

tions for preventive action, have been incorporated in his book entitled *Indian Constitutional Problems* *

Discrimination involved in Indian Law

Although the principle of religious neutrality has been generally observed in India by the British Government, ecclesiastical establishments maintained at State expense smack of some discrimination in favour of the Christians Bishoprics at Calcutta, Madras and Bombay had been established by statutory authority in 1813 and 1833 In subsequent Acts of Parliament provisions were made regarding them, their duties and functions, the nature of their appointment and the way in which expenditures incurred in their behalf might be met

Provisions in the Act of 1919

Bishoprics were maintained by sums provided out of the public funds of the country It was laid down in Section 118 of the Government of India Act that there might be paid to the Bishops of Calcutta, Madras and Bombay† out of the revenues of India such salaries and allowances as might be fixed by the Secretary of State in Council In the same section we find " there shall be paid out of the revenues of India the expenses of visitations of the said Bishops‡ " A provision was also made for payments, out of the country's public revenues, to legal personal representatives of the Bishops on their death while in office § His Majesty had power, under the Act,|| by a Sign Mannual warrant to make out of India's revenues adequate provisions for Bishops on certain

* Pp 320 21

† Considerable changes were effected in the position of the Church of England in India by the Indian Church Act of 1927 (17 and 18 Geo V, c 40) That Act was supplemented by the Indian Church Statutory Rules, 1929, made by the Secretary of State in Council and after consultation with the Bishop of Calcutta The Indian Church is now distinct from the Church of England, an innovation which is in general accord with the structure of Civil Government enshrined in the Government of India Act of 1935 The Governor General is held responsible for Ecclesiastical Affairs acting in his discretion, but in so far as in matters affecting his "special responsibilities" and "discretionary powers" he is subject to the control of the Secretary of State, the control of the Government of the United Kingdom is not completely eliminated

‡ s 118 (3)

§ s 119

|| s 120

conditions Then again, two members of the establishments of the chaplains maintained in each of the Presidencies of Bengal, Madras and Bombay were always Ministers of the Church of Scotland and entitled to have, out of the Indian Exchequer, such salary as was allotted to the military chaplains in the Presidencies * Apart from these provisions, the Act conferred upon the Governor General in Council power to grant with the sanction of the Secretary of State in Council, to any sect, persuasion or community of Christians not being members of the Church of England or the Church of Scotland such sums of money as might be expedient for the purposes of instruction or for the maintenance of places of worship † So it is clear that special privileges were given to all sections of the Christian population in India for their spiritual advancement No such privileges were accorded to Hindus, Mahomedans or any other religious sect, although between them they constitute a vast majority of the population

The new Act practically retains the old system

The new Act retains the old system in certain respects‡ by which spiritual ministrations are provided at State expense for Christian troops and civilians belonging to the Churches of England and Scotland in India Statutory arrangements are set out in detail in Sec 269 of the Act § This section is to be read with Sections 11 and 12 which give the Governor General power respectively to act in his discretion and in the exercise of his individual judgment The chaplains appointed by the Secretary of State in Council are protected in the same manner as the holders of Civil

* s 122

† s 123

‡ The establishment of Chaplains and not Bishoprics as under the old Acts is to be maintained at State expense.

§ As to the chaplains of the Church of Scotland there was opposition in the Committee of Commons to the primacy in Scottish ecclesiastical matters in India of the Presbytery of Edinburgh to the prejudice of other Scottish Church districts such as Glasgow Aberdeen Kirkcudbright and Dundee. Opposition was not pressed and fell through and the Act as it emerged finally accorded preferential treatment to the Presbytery of Edinburgh whose judgment in respect of forms and solemnities used in the Church of Scotland (according to which the Ministers of the Church of Scotland appointed as Chaplains must be ordained and inducted) however shall be subject to dissent protest and appeal to the Provincial Synod of Lothian and Tweeddale and to the General Assembly of the Church of Scotland [Commons Committee Debates April 1935 and s 269 (3)]

posts in the service of the Crown appointed by him By paragraph (c) of sub-section (3) of Sec 33, the maximum expenditure on ecclesiastical affairs in a year is fixed at forty-two lakhs of rupees, exclusive of pension charges,* but the expenditure, always within that limit, must be treated as a charge on the revenues of the Federation It shall not be submitted to the vote of the legislature concerned but shall be open to discussion in either Chamber.† A strong objection to the provision was recorded in the Committee of the Commons by Mr Morgan Jones and Mr Lansbury which proved ineffectual The objection was not to the amount of expenditure as such nor to the provisions for chaplains as was made clear in the course of the debate Mr Lansbury and Mr Jones attacked the principle of religious discrimination in favour of Christians involved in the expenditure of public money on them alone ‡ On the face of it, it was not fair to Hindus, Moslems and other religious sects whatever might have been the tradition of the past

Religious establishments cause trouble in Canada

In the self-governing Dominions the Christian Church establishments are similarly maintained by the State § Some of these establishments have, on occasion, given trouble to the Governments concerned Referring to the Roman Catholic Church in Canada Professor Keith observes

> "During the war the Church, unfortunately, was in the main antipathetic to any share in the dangers of the Empire and the anti-British attitude of the Pope was a factor in creating hostility to recruiting The war brought out also rather strongly the hostility of the French clergy to their Irish co-religionists, in 1915 all English-speaking professors were removed from the Roman Catholic University at Ottawa, compelling English-speaking students to find instruction elsewhere "||

* *Cf* the J P C Report, paragraph 186

† s 34 (1)

‡ Committee Debates (Official Report), April

§ Keith *Responsible Government in the Dominions*, Vol II, pp 1125 41

|| *Ibid*, pp 1133-34,

The principle of equality observed in Ireland

In the Irish Free State safeguards against religious discrimination have been provided in Art 8 of the constitution No law can be made there, either directly or indirectly, to endow any religion, to give any preference to any religious community or to affect prejudicially the right of any child to attend school receiving public money without attending the religious instruction at school or to make any discrimination in respect of State aid as between schools under the management of different denominations *

Amendment of present Act necessary

Now whatever might have been the justification in the past for the State Church establishments in India it looks unfair that rights and privileges should be enjoyed by Christians which are not extended to other sections of the people It seems proper in the interests of harmony amity and solidarity among the people, that either the State grants provided by the old Act for the maintenance of Bishoprics and by the new Act for that of Chaplains should be withdrawn or that similar provisions should be made for Hindu Mahomedan and other religious bodies or institutions The best course would in our view be to leave the financing of the religious establishments to individuals and private institutions They ought to be maintained that is by private endowments and not by funds provided out of public revenues of the country

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* Chap. IX supra

CHAPTER XVII

Safeguards against Discrimination

How the problem originated

One of the most controversial topics raised in connection with the safeguards for minorities is the problem of discriminatory treatment in legislation or administration which has received considerable attention in the Press both in India and in the United Kingdom and also at the Round Table Conferences It had been originally raised by the introduction, several years ago, into the Indian Legislative Assembly, of Mr Haji's Coastal Traffic Bill which proposed to reserve Indian coasts in certain circumstances to ships owned and controlled by Indian " nationals " The Nehru Committee, which was appointed to go into the Indian constitutional problem, observed in its report published in 1928 that " It is inconceivable that there can be any discriminating legislation against any community doing business lawfully in India "*

The main issues

The problem of protection against discrimination in India raises a number of important issues, viz , (1) whether members of the British community doing business in India or elsewhere are, and should be, treated in law as India's citizens and, if so, under what law, and whether as such they can be treated differently in law from His Majesty's Indian born subjects,† (2) whether the self-governing Dominions are bound by the British law of

* Nehru Report, *Introduction*, p 11

† The expression commonly used in the Government of India Act, 1935, is " British subject's domiciled in British India," " British subjects domiciled in Burma," or " British subjects domiciled in the United Kingdom," as the case may be, to denote, for all practical purposes, British Indian subjects, Burman subjects or European British subjects (Chapter III of Part V of the Act) These expressions have been adopted, as the Attorney General made it clear, because it is very difficult to ascertain what degree of racial descent will make a person an " Indian subject," a " Burman subject " or a " European British subject " A " British subject," wherever domiciled, means a " subject " not of Great Britain but of the Crown (Cmd 5482, p 38)

nationality and are entitled in law to treat differently different classes of British subjects (3) whether statutory safeguards against discriminatory treatment such as those embodied in the present India Act are consistent with fiscal autonomy (4) whether a difference ought to be made in law between the existing rights of the British community long since engaged in business in India and the claims of the European British subjects who intend in future to set up business here and (5) whether the criminal law privileges, if any, enjoyed by the European British subjects in India and sought to be retained are in complete accord with equality of the rights of citizenship and whether those privileges should be maintained intact

The confusion and its cause.

There is a measure of confusion as regards the status and position of His Majesty s subjects of other than Indian or British Indian domicile There is a belief widely held in India that all persons other than natural born Indians are foreigners in this country Even such a keen and acute jurist as Sir Hari Singh Gour was led to express that view for in the course of his speech on the question of protection to Bamboo Paper and Pulp canvassed in the Indian Legislative Assembly in February 1932 he is reported to have said that he does not regard the British as citizens unless they take out naturalisation papers and disclaim citizenship elsewhere * That view does not state the law correctly

The confusion seems to have arisen from the fact that nationality in British constitutional law is a term with varying connotations In one sense as the Report of the Conference on Dominion Legislation and Merchant Shipping Legislation of 1929 points out,† it is used to indicate the common consciousness based on race, language, traditions, or other analogous ties and interests and is not necessarily limited to the geographic bounds of any particular State In another and more technical sense it implies a definite connection with a definite State and Government and the use of the term in the latter sense

* See the Calcutta *Statesman* 24th February 1932.
† Cmd. 3479 para 73.

has, in the case of the British Empire, been attended by ambiguity due largely to its use for the purpose by denoting also the concept of allegiance to the Sovereign In this sense "nationality" means citizenship It has further been stated in the Report that "with the constitutional development of the communities now forming the British Commonwealth of Nations the terms *national, nationhood, and nationality*, in connection with each member, have come into common use" Save in *Eire* and partially also in Canada a "citizen" in different parts of the British Empire is, however, technically known as a subject of the Crown

A subject at common law and by statute

"A natural-born British subject" is a common law concept (Calvin's Case, 1608) and has also been defined in the Nationality and Status of Aliens Act of 1914 as amended in 1918, 1922* and 1933 † At common law as well as by statute any person born within His Majesty's Dominions including a British ship, wherever it is and within his allegiance, is deemed to be a natural-born British subject ‡ The child of a foreign diplomat accredited to the Crown or alien enemy in occupation of British territory is excluded Again the child of a British father, though born out of the British Dominions, is a natural-born British subject under certain conditions S 1 (1) (a) (c) of the 1914 Act, however, provides that persons born on foreign ships within British "territorial waters"§ are not to be treated as British subjects by reason only of the fact that the ships were within such waters at the time of their birth, but nothing in the section is to affect the status of persons born before the commencement of the Act, *i e*, before

* The amendment of 1922 was designed to add to the powers of the Crown to cancel naturalisation and enable British subjects resident in foreign countries to preserve their status from generation to generation

† The amendment of 1933 has sought to improve the position of married women in accordance with certain provisions of the Hague Convention

‡ Part I, s I (a)

§ See *placitum* 23 in List I of the Seventh Schedule to the India Act, 1935 The expression not being defined in the Act reliance is to be placed on the Territorial Waters Act, 1878, which describes it as one marine league from the coast For proprietary rights of a State in the soil under territorial waters around its coasts read the judgments in *Chelikani Rama Rao* v *Secretary of State* (39 M 617) and *A -G for British Columbia* v *A -G for Canada* (1914 A C 153)

January, 1915 The result is that the status of such persons will remain British as at common law or as determined by the British Nationality Acts of 1730 and 1772 and the Naturalisation Act of 1870 As Dicey put it, the Act of 1914 can be understood only if it is clearly realised that the existing law as to British nationality remains the common law except where that law is expressly varied by statute *

The Act of 1914 was preceded, apart from those of 1730 and 1772 by two important Acts, namely, the Act of 1847 and the Act of 1870 Under the former Act power was conferred upon the Colonial Legislatures to create local nationalities and the principle therein embodied was adopted in the Naturalisation Act of 1870 which now stands repealed in so far as provisions have been made in the Act of 1914

Changes in law

There are certain important points of difference between the Act of 1870 and the Nationality and Status of Aliens Act of 1914 For one thing the Act of 1870 had been passed without consultation with the Colonies while the new measure was adopted after a full dress debate in the Imperial Conference 1911, and with the consent and approval of the Dominions For another, a new orientation was given to conditions of naturalisation of aliens and that also with full Dominion assent Of the changes made in this respect perhaps the most important is that an alien naturalised in any Dominion under the Act of 1914 is no longer debarred from the rights and privileges incidental to naturalisation effected in England † In determining eligibility for admission to British nationality residence required under the relevant section of the Act is residence in the United Kingdom for not less than one year immediately preceding the application, and previous residence for four years in the United Kingdom or in any other part of the Empire so that residence in any part of the British Empire is accepted subject to a certain restriction, as equivalent to residence in the United Kingdom Formerly, persons naturalised in any Colony enjoyed a status in any other part

* *Conflict of Laws* pp 901-05

† Keith : *The Sovereignty of the British Dominions* p. 163.

of the Empire in no way better than that of the aliens They were as a general rule admitted to civil rights but could not enjoy and exercise what might be called political rights Even a Dominion Minister of the position of Sir G Perley of Canada had to suffer this humiliation The naturalised citizens of the Dominions were not eligible for admission to the Privy Council or to the roll of British Peerage or to Parliament

It should be noted here that the Act of Settlement, 1701, laid down that no alien, though naturalised, unless of British parents, might be a Privy Councillor, a member of Parliament, hold military or civil office or receive a grant of land from the Crown, provisions which have been repealed by or under the Act of 1914 * Holders of offices in the Civil Service under the Crown must normally be natural-born British subjects or children of persons who were at the time of death such subjects, but in certain cases exceptions were allowed † Again under the present Act naturalisation of an alien in the United Kingdom does not confer upon him the status of a British subject in any self-governing Dominion unless that Dominion has adopted the naturalisation provisions of the Act ‡ Those Dominions, which embody those provisions in local Acts, are entitled to create naturalisation having validity in all parts of the Empire save only in that particular Dominion which may not have accepted Part II of the Imperial Act of 1914. § But the definition of natural-born British subjects remains the same, and, according to that definition, which applies to all parts of the British Empire, ‖ natural-born British subjects are regarded as such in every part of the Empire

* s 3 (2) " Section 3 of the Act of Settlement (which disqualifies naturalised aliens from holding certain offices) shall have effect as if the words 'naturalised or' were omitted therefrom "

† 9 & 10 Geo V, C 22, Regulations, 17th Jan , 1930

‡ At present naturalisation fully accords the status of a natural born British subject including the right to sit in the Privy Council if appointed to the Council (*cf R* v. *Speyer*, 1916, 2 K B 858) A naturalised subject may, however, be deprived of his British nationality in certain circumstances, for example, if he has acquired British nationality (*i*) by false representation or fraud or concealment of material facts, or (*ii*) by speech or deed he has proved himself disloyal Naturalisation does not take effect unless the oath of allegiance is taken

§ Up to the year 1931 all the Dominions mentioned in the First Schedule to the Act have adopted the provisions relating to naturalisation

‖ *Eire* has repudiated that doctrine Besides, the doctrine of automatic applicability

The position in India

In this view of the case, persons born within His Majesty's dominions and allegiance are in law as much nationals of India as British Indians themselves, the expression 'national' being used in a broad sense and not as indicating membership of a particular unit of the Commonwealth or racial or religious affinity. The matter has been further amplified in s. 27 of the Act of 1914. The provision in this regard of the Imperial Statute, it may be noted, has been embodied in Act No. VII passed in February 1926 by the British Indian Legislature wherein it is stated* that "British subject means a British subject as defined in Section 27 of the British Nationality and Status of Aliens Act, 1914". There is, therefore, hardly any room for controversy as to the proposition that in law European British subjects are India's citizens, if that expression may be used. They are not aliens.

Nationals and subjects.

Within the broader circle of British nationality, however, as defined in the Imperial Statute, certain Dominions have claimed and exercised the right of defining a narrower class of Dominion "nationals". "Two of the Dominions," we find in the Report aforesaid, "have passed Acts defining their nationals both for national and international purposes."† Canada first took the initiative in 1910 in order to specify what persons were so connected with that Dominion as to be excluded from the operation of the Immigration Laws. Under s. 11 of the Immigration Act of 1910‡ an alien in Canada is defined as being a person who is not a British subject, and a Canadian citizen is defined as being (*i*) a person born in Canada who has not become an alien, or (*ii*) a British subject who has Canadian domicile, (*iii*) a person naturalised under the laws of Canada who has not subsequently become an alien or lost Canadian domicile.

of the first part of the Imperial Act was open to doubt in some Dominions and hence they have re-enacted it to make the position absolutely clear.

* s. 2

† Cmd. 3479, para. 74.

‡ *Revised Statutes* 1927, c. 93.

It is clear that a British subject does not *ipso facto* become a Canadian "national" unless he has acquired Canadian domicile and has been a resident in Canada for at least five years as a place of permanent abode and not for a mere special or temporary purpose * Such domicile is lost by a person voluntarily residing out of Canada with *intent* to make his permanent home out of that Dominion; and any naturalised British subject or any British subject, not born in Canada but having Canadian domicile, is presumed in law to have lost it by having resided outside of the Dominion for one year † Five years' residence outside is conclusive proof This Act was followed by the Canadian Nationals Act of 1921, and s 2 thereof is important for our consideration According to it again, every British subject does not by virtue merely of his allegiance to the Crown acquire Canadian nationality He must be a Canadian citizen within the meaning of the Immigration Act Practically, therefore, the provisions of the Act of 1910 were adopted in the Canadian Nationals Act They extend to the wives of Canadian citizens or their children born out of Canada But they do not acquire Canadian citizenship through the husband or father or mother unless they have at some time or other landed in Canada

The Nationals Act came as a result of Canada's demand for a seat on the Permanent Court of International Justice under the League of Nations The law under the League‡ states in effect that more than one " national " of a single Power cannot be elected to serve on the Court But by virtue of its independent membership of the League of Nations Canada was, in theory at least, also an independent member of the Court, but it could not claim to sit on it so long as Canada and the United Kingdom were regarded as component parts of a common British nationality because the latter had already been elected to the Court This difficulty had to be got over, and hence the necessity arose for creating a " nationality " within " nationality " so that a Cana-

* s 2 (e) (i)
† s 2 (ii) (iii)
‡ Art 10 (2) of the Statute

dian citizen to-day generally enjoys two kinds of nationality, namely, Canadian nationality* and British nationality

The Union of South Africa has followed in essentials the Dominion of Canada in regard to the local law of nationality, many of the provisions of the two Acts being identical †

A Union national‡ is defined as

I A person born in any part of South Africa included in the Union who is not an alien or a prohibited immigrant under any law relating to immigration

II A British subject whose entry into any part of South Africa included in the Union was in accordance with any law governing at the time of such entry the immigration of persons into that part of South Africa and who has for a period of at least two years thereafter been continuously domiciled in the Union

III. A person domiciled in the Union and not being a prohibited immigrant under any law relating to immigration who became a naturalised British subject under the laws of any part of South Africa included in the Union and who has for a period of at least three years after entry into that part of South Africa been continuously domiciled in the Union and has not become an alien

IV A person born outside any part of South Africa included in the Union whose father was a Union national at the time of such person s birth or would have been a Union national if this Act had at the time of such person s birth been in force and was not in the service of an enemy State provided that nothing in this paragraph contained shall apply to any person who if he enters or is found in the Union would in terms of any law relating to immigration be a prohibited immigrant

* In 1931 Canada provided by legislation that the marriage of a woman would not deprive her of Canadian nationality where she did not acquire her husband s nationality (*Revised Statutes* 1927 c. 21) Australia and New Zealand in legislating as to the married women have however gone further than the United Kingdom. The legislation in each case gives within the Dominion a woman who has lost British nationality by marriage to an alien the privileges of a British subject (*The Australian Nationality Act*, 1936 and *The British Nationality and Status of Aliens in New Zealand Amendment Act*, 1935)

† In Australia also the Government have power under the Immigration Act 1925 to forbid by a Proclamation to that effect the entry of persons of any race or nationality who according to them, are undesirables. Compare in this connection the provisions of Part III of Chapter V of the Government of India Act 1935

‡ Act No 40—November 11 1927 (Text from the *Statutes of the Union of S A.*, 1927 28)

Laws in Canada and South Africa

A comparison between the Canadian Act and the Union Act will show that notwithstanding striking similarity, there are one or two points of difference In the Union Act, for example, no provision has been made regarding the loss of Union nationlity on account of prolonged absence from the Union It only says that a Union national other than those born there remains a national so long as he retains his Union domicile and does not become an alien* thus giving rise to certain complications in law This somewhat vague provision is liable to be abused by the Union Government and their agents to the detriment of the interests of persons not born in the Union It is, however, to be admitted that the South African Statute contemplates, if by implication, that proof of the existence of Union domicile is to be determined by residence and intent to reside on the part of the person concerned But as in the case of Canada a Union national may renounce his Union nationality Whatever might be the points of difference, there is no doubt, as in the case of the Dominion of Canada, that a British subject, not born in the Union, does not automatically become a Union national unless he has fulfilled the conditions laid down in the Immigration Laws and unless further he has acquired Union domicile by having resided there for a prescribed period of time The Act empowers the Union Government, just as the Canadian law empowers the Dominion Government, to prevent the entry of any British subject and exclude him from the rights and privileges of citizenship

A precedent created in Southern Ireland

The Irish Free State (at present designated as *Eire*) has created a precedent in this respect in Empire jurisprudence † Article 3 of the Constitution lays down

* s 1 (c)

† With the object of clarifying the position of Free State citizenship the Irish Legislature adopted a measure in 1935 repealing the British Nationality and Status of Aliens Acts of 1914 and 1918 in so far as they were applicable to the Free State It prescribes that persons born in the Free State on or after December 5, 1922, or on ships therein registered, or outside the State before April 10, 1935, if the father was then an Irish citizen, will now be natural born citizens Those born after April 10, 1935, outside the State obtain citizenship if the father, being a citizen, is in the employment of the State

Every person without distinction of sex domiciled in the area of the jurisdiction of the Irish Free State (Saorstat Eireann) at the time of the coming into operation of this Constitution who was born in Ireland or either of whose parents was born in Ireland or who has been ordinarily resident in the area of the jurisdiction of the Irish Free State (Saorstat Eireann) for not less than seven years is a citizen of the Irish Free State (Saorstat Eireann) and shall within the limits of the jurisdiction of the Irish Free State (Saorstat Eireann) enjoy the privileges and be subject to the obligations of such citizenship

This law shows that birth or residence for a specified number of years apart from domicile, is an essential condition of Irish citizenship which means that a British subject born in England or in any part of the British Empire except Ireland does not acquire Irish citizenship and its rights and privileges unless he is domiciled and has resided for at least seven years within the limits of the jurisdiction of the Irish Free State Two important results follow First although most Irish citizens under this law are British subjects the definition, as Professor Keith points out covered some persons born of foreign fathers and Irish mothers like Mr De Valera * Secondly the definition involves the exclusion of British subjects not being Irish citizens, from the political rights of citizenship Professor Keith seems to think that the British Government ought not to have accepted this definition of Irish citizenship because in his view it amounted to a drastic modification of the normal rule that political rights in the Dominions are extended to all British subjects on identic terms He adds that though citizens of the Irish Free State still enjoy in the rest of the Empire the rights accorded to British subjects in general, political rights in the Free State are strictly limited to citizens of the Free State by the Constitution †

Different classes of British subjects

There are as a well read student of the Dominion constitutional laws observes ‡ at least three and possibly four kinds of British subjects in the

* Keith *The Dominions as Sovereign States* p 169

† Keith : *The Sovereignty of the British Dominions* p 65

‡ E F W Gey Van Pittius : *Nationality within the British Commonwealth of Nations* p 228.

Empire There are, in the first place, British subjects by local naturalisation who enjoy that status so long as they are within the territory concerned, for instance, aliens naturalised under the Indian Naturalisation Act of 1926 * They are not British subjects in other parts of the Empire, but are entitled to British protection abroad In the second place, there are naturalised subjects as by or under the Imperial Statute who occupy the same status as natural-born British subjects In the third place, there are natural-born British subjects who have been defined in the Imperial Statute and are regarded as such in almost every part of His Majesty's Dominions and Possessions Lastly, there are the Dominion nationals who must belong to any one of the first three classes

With the singular exception of Southern Ireland the whole British Empire is governed in regard to the definition of natural-born British subjects by the Imperial Statute How the Dominions, which have by their own legislation accepted the Nationality Act of 1914, are going to shape and determine their policy in this matter after the Statute of Westminster, it is difficult to say at the present moment There is, however, no confusion as regards the present law, as we have already pointed out

Differential treatment for different classes?

The question that now arises is Is it correct to say that political rights in the Dominions are extended to all British subjects on identical terms, or are not the Dominions entitled to treat differently different classes of British subjects? The answer to this question has been supplied by numerous authorities It is to be found in the Imperial Statute of 1914 itself and also in the laws and regulations passed by most of the Dominions from time to time. We have previously given† a long catalogue of social, economic and political disabilities from which His Majesty's Indian subjects, who are natural-born British subjects, have been suffering for years past in those Dominions This kind of treatment of British Indians by the Dominions has been defended on frequent occasions by Imperial statesmen on constitutional, political and economic grounds We have further referred to the Im-

* s 7 (1)
† Chapter XI, *supra.*

migration laws of some of the Dominions which may be applied against British subjects irrespective of the country from which they come Then again, Canada and South Africa not to speak of Southern Ireland have evolved local nationalities seeking to deprive British subjects born outside those Dominions of local rights and privileges so long as they do not satisfy the domicile and residence tests as laid down by laws Common allegiance to the Crown is, therefore, of no practical use in the matter of equality of treatment Although at common law as well as by the Imperial Statute of 1914 the definition of British subject has been made clear, it does not by itself guarantee equality of rights and privileges to such subjects in each and every part of the British Empire It must not says Dr Pittius for one moment be thought that a natural born British subject enjoys by virtue of his nationality any social and political rights in all the Dominions He does not All legislation discriminating between British subjects has been carefully safeguarded *

This view finds support in s 26 (1) (2) of the Nationality and Status of Aliens Act, 1914† which lays down

> Nothing in this Act shall take away or abridge any power vested in or exercisable by the legislature or Government of any British Possession or affect the operation of any law at present in force which has been passed in exercise of such a power or prevent any such legislature or Government from treating differently different classes of British subjects

> All laws statutes and ordinances made by the legislature of a British Possession for imparting to any person any of the privileges of naturalisation to be enjoyed by him within the limits of that Possession shall within those limits have the authority of law

The position of the Dominions in this respect has been strengthened by s 2 of the Statute of Westminster which has repealed the Colonial Laws Validity Act of 1865 that sought to

* Pittius *Nationality within the British Commonwealth of Nations* p 8

† 4 & 5 Geo V C 17 This section does not confer new rights or powers on the legislature or Government of any British Possession; it is only a saving for the rights or powers that then existed and for laws that were already in force

limit in certain respects the powers of the Colonies as they were then known *

The Statute puts the present law thus

"The Colonial Laws Validity Act, 1865 † shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion

No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to *the law of England*, or to the provisions of any *existing or future Act of Parliament of the United Kingdom*, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of the Dominion shall include the power to repeal or amend any such Act, order rule or regulation in so far as the same is part of the law of the Dominion "‡

* The Validity Act of 1865 (c 63) was designed to circumvent the decisions, especially of the South Australian Supreme Court, which held certain local Acts *ultra vires*, inasmuch as they were repugnant to the *laws* of England The Act laid down that Colonial laws should not be held invalid unless they were repugnant to some Act of Parliament which expressly or by necessary intendment applied to the Colony They were inoperative only to the extent of repugnancy In *Nadan* v *The King* (1926, A C 482) a Canadian law was declared *ultra vires* on the doctrine of repugnancy as contemplated in the 1865 measure Colonial legislatures were thus left free to promulgate legislation being contrary or repugnant to the *laws* of England in so far as they were not incorporated in Parliamentary Statutes Having regard to the South Australian Supreme Court's decisions it may be said that the 1865 Act extended rather than restricted the scope of Colonial legislation S 10 of the Statute of Westminster provides, however, that s 2 will not, unless adopted, apply to Australia, New Zealand or Newfoundland, although they come under what may be called the " definition " section of the Statute

† 28 & 29 Vict C 63

‡ George V, C 4 The phrase " as part of the law of the Dominion " deserves notice It was not inserted in the formula recommended in 1929 It was apprehended by the British delegation to the 1930 Conference that the clause as drafted in 1929 might be interpreted as ousting in the Dominions that operation of the laws of the British Parliament which the legislation of one State normally has in another State according to the comity of nations " The anomaly was subsequently removed by the insertion of the phrase in the formula which finally emerged so that the Dominions have been left free to extend to English laws the comity which they extend to (*e g*) German " " Thus the English Court's consider decrees of nullity of marriage given in Germany good," observes Mr Robert P Mahaffy, " if they were made according to the law of Germany, even though they may have been given for reasons which no English judge could accept (*Mitford* v *Mitford*, 1930) In a sense it is no part of our law that a lady can get rid of her husband if she is disappointed with his temper, but as it is the law of Germany that she may do so, we admit the decrees given for such reasons as good " (Read Robert P Mahaffy's *The Statute of Westminster*, 1931, p 11, and K C Wheare's *The Statute of Westminster*, 1931, pp 73 75) It may, however, be submitted that if

Then again it may be noted that under s 4 of the Merchant Shipping Act, 1869, a British Possession was competent by any Act or Ordinance to regulate its coasting trade subject in each case to the following restrictions

I The Act or Ordinance shall contain a suspending clause providing that such Act or Ordinance shall not come into operation until Her Majesty s pleasure thereon has been publicly signified in the British Possession in which it has been passed

II The Act or Ordinance shall treat all British ships including the ships of any British Possession in exactly the same manner as ships of the British Possession in which it is made

III Where by a Treaty made before the passing of this Act Her Majesty has agreed to grant to any ships of any foreign State any rights and privileges in respect of the coasting trade of any British Possession such rights and privileges shall be enjoyed by such ships for so long as Her Majesty has already agreed or may hereafter agree to grant the same anything in the Act or Ordinance notwithstanding

Those provisions were re-enacted as ss 735 and 736 of the Merchant Shipping Act 1894 * But these two sections now shall be construed as though reference therein to the legislature of a British Possession did not include reference to the Parliament of a Dominion † So the restrictions hitherto imposed upon British Possessions are removed so far as the self governing Dominions are concerned and the legislature of each one of them has at present power to impose conditions of a general character on all ships engaged in its coasting trade or to impose Customs tariff duties on ships built in other parts of the Commonwealth or outside it or to give such financial assistance as it thinks fit to its own ships or to reserve the coasting trade to its own national ships

what has been suggested by Mahaffy is the restriction sought to be imposed upon a Dominion legislature by the phrase in question the language is curiously inapt for the principles of private international law which apply to issues such as those described by the author form part of the municipal law in a wide sense and would therefore be subject to Dominion legislation despite the restriction imposed. The contrary view would lead to the conclusion that even in internal matters a Dominion has no plenary powers of legislation.

* 57 & 58 Vict. C 60

† *The Statute of Westminster* s. 5

Let us now proceed from the laws to the views expressed by certain well-known authorities Dicey has told us that "it must be noted that while the inhabitants of England and of the Dominions express at each Conference their honest pleasure in Imperial unity the growth of imperialism already causes to many patriotic men one disappointment Events suggest that it may turn out difficult, or even impossible, to establish throughout the Empire that equal citizenship of all British subjects which exists in the United Kingdom and which Englishmen in the middle of the nineteenth century hoped to see established throughout the length and breadth of the Empire "*

Expressions of expert opinion

Professor Keith states

"While the advantages flowing from the British nationality to inhabitants are very considerable, it can hardly be said that British nationality in itself confers upon any British subjects in the Dominions any special rights Nor in any case it is obvious that the immigrants welcomed by the Dominions are really superior to those whom on colour grounds they reject the Galicians of Canada are alien in speech, in race, in religion, in social customs The Yiddish-speaking immigrants in South Africa do no credit to the name of Europe or the alleged European languages which they speak
The conclusion from these facts is not of course that the Dominions should endanger their racial composition or that they should attempt to mingle Europeans and Asiatics in one community, but that, possessing as they do the principle of racial purity, they should be more particular in choosing the class of European immigrant who is likely to be a real element of value in the future "†

Again he adds ·

"It is doubtless disappointing to realise that there is nothing that British nationality can be said to carry with it as an advantage in the oversea Dominions of the Crown, the protection of the Imperial Government for a British subject is far more effective in foreign countries than it is in the oversea Dominions "‡

* Dicey *Opt cit*, *Introduction*, pp xxxvi xxxvii

† Keith *Imperial Unity and the Dominions*, pp 253 58

‡ *Ibid*, p 25.

At the Imperial Conference, 1911, Lord Crewe, the then Secretary of State for India, made the following statement on the status of His Majesty s subjects

> I recognise fully—as His Majesty s Government fully recognise—that as the Empire is constituted the idea that it is possible to have an absolutely free interchange between all individuals who are subjects of the Crown—that is to say that every subject of the King whoever he may be or wherever he may live has a natural right to travel or still more to settle in any *part of the Empire—is a view which we fully admit and* I fully admit as representing the India Office to be one which cannot be maintained As the Empire is constituted it is still impossible that we can have a free coming and going of all subjects of the King throughout all parts of the Empire Or to put the thing in another way nobody can attempt to dispute the rights of the self governing Dominions to decide for themselves whom in such case they will admit as citizens of their respective Dominions *

In dealing with the subject of the deportation of certain Labour leaders from South Africa the Right Hon ble L Harcourt in the course of a speech in the House of Commons on the 12th of February 1914 said

> Autonomy (Dominion autonomy) carries with it no autonomy from the Press or public criticism but it deserves and is entitled to the largest amount of relief from official interference and Parliamentary censure which is compatible with the inherent rights of freedom The British citizenship to which my honourable friend referred is really a misnomer It does not, in fact exist it is an attempt to make too literal a translation of the *civis romanus sum* The Imperial Parliament here cannot grant responsible self government as it has done throughout nearly a century in varying degrees in different times and to different races with practically unqualified success and then hope or attempt when feelings of prejudices are aroused to interfere or intervene as if it were dealing with a Crown Colony or a Protectorate We

* *Minutes* Cmd. 5745 p 395

have never insisted on similarity or simultaneity in their law-making. We have allowed them, without let or hindrance, to try what many people in this country regard as experiments, and some people regard as dangerous experiments. We have not interfered."*

The Imperial Conference formula of 1923

The question of common British Nationality and the rights arising from it was hotly debated at the Imperial Conference of 1923, and the two most prominent delegates who took part in the controversy were General Smuts from South Africa and Sir Tej Bahadur Sapru from India. There at the Conference the implications of British "citizenship" were thoroughly discussed and laid bare before the world in general and India in particular. General Smuts defined the position thus: "There is one British citizenship over the whole Empire. . We must not derive from one British citizenship rights of franchise because that would be a profound mistake. The attitude has been that the franchise does not depend upon British citizenship. It is only in India that this position is not understood."†

Sir Tej Bahadur Sapru made a vehement protest against the South African Prime Minister's contention and practically held out a thinly-veiled threat. He observed:

> "If the Indian problem in South Africa is allowed to fester much longer, it will pass beyond the bounds of domestic issue and will become a question of foreign policy of such gravity that upon it the unity of the Empire will founder irretrievably. You cannot, according to the modern law of citizenship and according to the latest development of thought, have two kinds of citizenship in the same Empire, a higher and a lower."‡

A memorandum drawn up by General Smuts was then submitted to the Conference in which the position of the British sub-

* Keith: *Speeches and Documents on Colonial Policy*, Vol. II, pp. 110-11; *Parliamentary Debates, Commons*, Vol. LVIII, 1914 (Feb. 10 to Feb. 27), pp. 78-84.

† Cmd. 1988 (1923).

‡ *Ibid.*

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jects in different parts of the Empire was clearly and succinctly put * It stated

> The Indian claim for equal franchise rights in the Empire outside of India arises in my opinion from a misconception of the nature of British citizenship The misconception is not con fined to India but is fairly general and the Conference would do not only India but the whole Empire an important service by its removal The misconception arises not from the fact but from the assumption that all subjects of the King are equal that in an Empire where there is a common King there should be a common and equal citizenship and that all differences and distinctions in citizen rights are wrong in principle Hence it is claimed that whether a British sub ject has or has not political rights in his country of origin he should on immigration to another part of the Empire where British subjects enjoy full political rights be entitled automatically to the enjoyment of these rights It is on this basis that equal political rights are claimed for Indians who live in the Dominions or Colonies outside India It is of course clear that the assumption on which the claim is based is wrong There is no equality of British citizenship throughout the Empire On the contrary there is every imaginable difference British citizenship has been variable in the past it is bound to be even more in the future The com position and character and rights of its people will be the concern of each free and equal State of the Empire It will not only regulate immigration from other parts of the Empire as well as from the outside world but it will also settle the rights of its citizens as a matter of domestic concern
>
> It would thus be left to the good sense of each State of the Empire to say what citizen rights shall be enjoyed and by whom within its territorial jurisdiction and no State of the Empire should have claim to force its citizens on any other State or resent their exclusion or special treatment by the latter

His Majesty s Secretary of State for the Colonies thereupon made the following statement

> It is not inconsistent with this principle (common nation ality) to recognise as it has always been recognised

* Cmd. 1988 (1923)

that every part of the Empire is free to settle its own domestic concerns, including the rights to be enjoyed within its territory. . It is important not to confuse the issue by any ambiguous use of such words as 'citizen' or 'citizenship' If those words are used, as they rightly may be, as having a local significance and constituting a status or rights which it is within the power of any self-governing Dominion to confer on persons within its territory, they should not at the same time be used as though they were synonymous with the Imperial conception of nationality "*

Although, as we have seen, Sir Tej Bahadur Sapru had raised his voice of protest at the Imperial Conference against the treatment meted out to Indians in South Africa, he reconciled himself to the view, quite properly, that British nationality or common allegiance to the Crown did not in law prevent certain parts of the Empire from limiting the rights and privileges of any British subject Speaking before the Benares Hindu University on the study of Constitutional Law he said

"Now British nationality, thus acquired by a foreigner through the process of naturalisation, confers on him the full status of a natural-born British subject The principle, however, we are told by constitutional writers, should not be pressed too far, for it is maintained by them that this fact does not prevent any part of the Empire limiting the rights, political and civil, of any British subject This is the inevitable consequence of responsible self-government What the reactions of this doctrine may be on the strength of the tie which unites or ought to unite one part of the Empire to the other, is a problem for the consideration of the statesman rather than for the constitutional lawyer Meanwhile, even the constitutional lawyer may indulge in the hope that a larger conception of Imperial citizenship resting on allegiance to the common Sovereign may not be impossible to achieve Might not the constitutional lawyer, therefore, ask if there is not room enough for a further development of the idea of nationality within the Empire itself without infringing the freedom of the self-governing members of the Empire?"

Again explaining the position of Indians abroad in the light of s 26 of the British Nationality and Status

* Cmd 1988 (1923).

of Aliens Act, 1914, the Right Hon'ble Srinivasa Sastri observed

> The law therefore is against us If that is the case you will not be surprised to hear my next statement which you must remember also It is all meant to moderate your disappointment and your anguish when you think of this matter Mind you the Dominions have asserted before and have more than once exercised the right of keeping out Englishmen when they consider that a desirable case It is not therefore against us exclusively that these restrictions are directed *

We now come to the observation made in the report of the Conference on Dominion Legislation and Merchant Shipping Legislation, 1929 The Report states

> A common status directly recognised throughout the British Commonwealth in recent years has been given a statutory basis through the operation of the British Nationality and Status of Aliens Act 1914 It is of course plain that no Member of the Commonwealth either could or would contemplate seeking to confer on any person a status to be operative throughout the Commonwealth save in pursuance of legislation based upon common agreement and it is fully recognised that this common status is in no way inconsistent with the recognition within and without the Commonwealth of the distinct nationality possessed by the nationals of the individual States of the British Commonwealth †

Principles earlier affirmed reiterated in 1937

The position was not in any important respect altered at the Imperial Conference of 1937 The difficulty was and is not with regard to definition, for both at common law and by statute a British subject is easily traceable the difficulty arose and arises in connection with his rights and privileges in various parts of the Empire Each Member of the Commonwealth normally includes as

* Sastri *Kamala Lectures* (Cal. Univ Publication) pp. 53-54.
† Cmd. 3479 paras. 76 & 78.

belonging to it all persons born in, or accorded the status of British subjects by naturalisation in its territory or by annexation, who still reside there, and also all persons who, coming as British subjects from other parts of the Empire, have identified themselves with the community to which they have come Whether a person has so identified himself is a question to be decided by each Member for itself Certain parts of the Commonwealth have each in its own way defined membership of its own community in terms of distinct "nationality," but whether or not each of them has accorded statutory recognition to such a concept, there is little doubt that Members of the Commonwealth do distinguish for some practical purposes, to a greater or less extent, between British subjects in general and those British subjects whom they regard as being members of their own respective communities

Discrimination under a common status

The phrase "a member of the community" is intended to have a rather technical meaning "as denoting a person whom that Member of the Commonwealth has, either by legislative definition of its nationals or citizens or otherwise, decided to regard as 'belonging' to it, for the purposes of civil and political rights and duties, immigration, deportation, diplomatic representation, or the exercise of extra-territorial jurisdiction" Subject to this the Committee on Constitutional Questions appointed at the Conference of 1937 have suggested that it is desirable to "secure as far as possible uniformity in principle in the determination by each Member of the Commonwealth, of the persons, being British subjects, to be regarded as members of its community, and to avoid, as far as possible, the inconveniences which might arise if a particular person were to belong, at the same time, to two or more Members of the British Commonwealth"* The formula, however, practically leaves things as they are, and there is nothing to prevent a Member of the Commonwealth from treating a British subject as an "alien" for all practical purposes except in so far as the legal doctrine of "common status" may be relied upon in maintaining in theory Imperial unity

* Cmd 5482, pp 25-26

The present law and its effect.

The conclusions that emerge from the preceding discussion of the British Nationality and Status of Aliens Acts, the decisions reached at the Imperial Conferences, the measures adopted in certain Dominions and the views expressed by competent authorities are these First, there is a common law of nationality which is applicable in all parts of the Empire save perhaps in *Eire* in so far as the provisions of the Imperial Acts as part of the law of that State have been repealed by the Irish Citizenship Act, 1935 A person, who is a natural born British subject in the United Kingdom, is a natural born British subject in India or in any part of the Empire and is entitled as such to certain privileges in foreign countries So far, therefore, as Part I of the Act of 1914 is concerned, the principle therein formulated has been accepted and recognised practically throughout the Empire Secondly, within this broad law certain Dominions have evolved local nationalities which hold good both for national and international purposes Thirdly, the Dominions have the right, which they have frequently exercised, to naturalise aliens according to laws passed by their own Parliaments * Fourthly the common British nationality within the Empire or common allegiance to the Crown does not carry with it common political, social or economic rights in each and every part of the Empire †

The law has conferred upon Members of the Commonwealth power to treat differently different classes of British subjects It permits them not only to pass discriminatory legislation within their jurisdiction but also to control, restrict and stop the entry of British subjects from other parts into their territories As a matter of fact some of the Dominions have given concrete ex

* Persons naturalised in a Dominion, but not in terms of the Imperial Act are not British subjects outside the Dominion concerned according to decisions pronounced before the passing of the Statute of Westminster (*R* v *Francis* [1918] 1 K. B 647 *Markwald* v *Attorney General* [1920] 1 Ch. 348)

† Although in the United Kingdom the general practice is not to make any distinction between different classes of British subjects birth in the United Kingdom or a Dominion is required of an appointee under the control of the British Foreign Office and his parent thereby perpetuating some measure of discrimination against other British subjects (Anson s *The Law and Custom of the Constitution* edited by Keith Vol. II Part I, p 240).

pression to this sentiment of individuality by a series of anti-Indian legislative enactments and immigration Acts

In *Eire* citizenship is treated as the basis of political rights That principle has been adopted in the Franchise Laws Amendment Act, 1931, of the Union of South Africa Again by the Union Act, 1934, the right to qualify as Senators or Members of the House of Assembly has been restricted to Union nationals Under the South Africa Act of 1909, seats in the Senate or in the House of Assembly were open, subject to other qualifications, to " a British subject of European descent "* The appropriate sections have been so amended by the Status of the Union Act of 1934† that a qualified candidate for these seats must be " a person of European descent who has acquired Union *nationality* whether (*i*) by birth or (*ii*) by domicile as a British subject or (*iii*) by naturalisation, or otherwise, in terms of Act 40 of 1927 or of Act 14 of 1932 " It is clear that in those Dominions British subjects *qua* British subjects merely by virtue of their common allegiance to the Crown are not entitled to all political rights

The Imperial Conference of 1930, while recognising that it was for each Member of the Commonwealth to define for itself its own nationals, expressed the desire that, as far as possible, nationals of different parts of the Commonwealth should enjoy *common status* Allowance was, however, made for special circumstances that might warrant divergences from this general principle The idea is that " the possession of the common status in virtue of the law for the time being in force in any part of the Commonwealth should carry with it the recognition of that status by the law of every other part of the Commonwealth " On the face of it, these two principles are inconsistent with each other For, if any Dominion is entitled to promulgate any law without taking into consideration the needs and requirements of any other part of the Empire, it seems to be unfair that it should be permitted to enjoy any benefits, however slight, from the common status

* ss 26 (d) and 44 (c)
† s. 6

Calvin s Case and common status

The question of the common Crown brings in the question of common allegiance and on that common allegiance the entire conception of British nationality has been allowed to rest as is evidenced by the well known decision in Calvin s Case * It was decided in that case that persons born in Scotland after the union of the Crowns of England and Scotland were natural-born British subjects despite the absolutely distinct character of the two Kingdoms The same view was taken in the case of the union of the Crown of England with the Electorate of Hanover From this it follows that even if different parts of the Empire were treated as separate Kingdoms their inhabitants would be subjects of the Crown in the United Kingdom so long as they owed allegiance to the Crown This is of course stretching the legal aspect rather too far

Historically and for centuries the concept of nationality has been determined by the English Common Law which had been carried to the Dominions or to other British territories † but the development of the nationality concept and law has kept pace with the development of Dominion sovereignty and we find to-day definite attempts to distinguish by local legislation from

* 7 Coke 1 (1608)

† The common law of a settled Colony is English law [*Blankard* v *Galdy* (1693) *Catterall* v *Catterall* (1847) and *Kielly* v *Carson* (1842)] In a conquered or ceded Colony the laws in force at the time of conquest or cession continue to have effect and force until they are altered [*Blankard* v *Galdy* (1693)] There is in such a case no automatic application of English law In South Africa for instance which was conquered from the Dutch the basis of the law generally is the Roman Dutch law Such indeed is the common law of Ceylon The customary law of Paris is the law of Quebec while the French Civil Code rules the law of Mauritius. But as Jennings and Young say this principle is subject to certain qualifications: First by conquest or cession the citizens of such a Colony become British subjects with the rights and liabilities such as are incidental at the moment to British nationality [*Donegani* v *Donegani* (1835)] Secondly the principle assumes the existence of a civilised system of law in the conquered or ceded Colony in question; and it was decided by the Privy Council that no matter whether Penang in the Straits Settlement was a conquered or settled Colony the local Malay law could not apply to English settlers [*Yeap Cheo Neo* v *Ong Cheng Neo* (1875)] Thirdly the local law cannot govern English settlers if it is so entangled in religious beliefs that it cannot be applied to those who do not share those beliefs [*Freeman* v *Fairlie* (1817)] Finally the principles of a local law which were repugnant to natural justice must be regarded as immediately and automatically extinguished on the transfer of the territory to the Crown [*Fabrigas* v *Mostyn* (1817)] Read *Constitutional Laws of the British Empire* by Jennings and Young pp. 26-23.

among the wide category of British subjects specific types of Dominion nationals

A formula was sought to be evolved in the Report of the Conference on the Operation of Dominion Legistion and Merchant Shipping Legislation, 1929, for the purpose of providing security against confusion The Report states

> "The status of the Dominions in international relations, the fact that the King on the advice of his several Governments assumes obligations and acquires right by Treaty on behalf of individual Members of the Commonwealth, and the position of the Members of the Commonwealth in the League of Nations and in relation to the Permanent Court of Justice, do not merely involve the recognition of these communities as distinct juristic entities, but also compel recognition of a particular status of membership of those communities for legal and political purposes These exigencies have already become apparent, and two of the Dominions have passed Acts defining their 'nationals' both for national and international purposes "*

But stress was at the same time laid on the unity of Members of the Commonwealth supposed to arise out of common allegiance to the Crown which was taken in the Report as the basis of common status possessed by all its subjects It was further claimed that this common status was given statutory recognition and force through the operation of the British Nationality and Status of Aliens Act, 1914 It was, however, made clear that although this status could not be conferred on any person to be operative throughout the Empire save in pursuance of legislation based upon common agreement, it was in no way inconsistent with the recognition *within and without the Commonwealth* of the distinct nationality possessed by the citizens of individual Members of the British Commonwealth The Imperial Conferences of 1930 and 1937 re-affirmed those principles in clear words

Common status but local divergences

The formula recognised the right of each Dominion to create a particular status for political and other purposes and to define by local legislation its own nationals for *national and international purposes* It also laid down that if any changes were

* Cmd 3479, para 74

desired in the existing requirements for the common status, provision should be made for the maintenance of the common status and the changes should only be introduced after consultation and agreement among several Members of the Commonwealth It was agreed at the Conferences that each Dominion should, as far as possible, confer its nationality only on those possessing the common status and that the possession of that status should be recognised throughout the Commonwealth It was, however, stipulated that although Dominion nationals should be persons possessing the common status, local conditions or other special circumstances might from time to time necessitate divergences from that general principle Two points seem to emerge both from the Report of the Conference on Dominion Legislation, etc 1929, and from the Imperial Conferences of 1930 and 1937 These are (1) that each Dominion is free to act in defining its nationals both for internal and extra territorial purposes, and (2) that there should be recognition by each Dominion of the common status of British subjects based on common allegiance to the Crown despite its power to act locally

This formula is rather defective and lacking in precision and is liable to misinterpretation in different parts of the British Commonwealth Speaking in the *Dail* Mr McGilligan observed as follows

> The essential point is that you have not a single Commonwealth nationality based upon a single law It is not a single Commonwealth nationality at all or even a dual nationality The Irish Free State national will be that and nothing else so far as his nationality is concerned His own nationality law will rule him and his own State through its representatives abroad will protect him And the recognition of his Irish nationality will be Commonwealth wide and world wide *

Southern Ireland rejects the formula in effect

There was no mention in his speech of the so-called common status, far less any recognition of it That Mr McGilligan s speech was not a pleasing oration on a festive occasion is proved by the Irish Nationality and Citizenship Act, 1935 That measure

* Mr McGilligan in *Dail Eireann* July 16 1931

led to an acute "triangular" controversy in England, in the Free State and in Scotland. It repeals for the State the British Nationality and Status of Aliens Act, 1914, and the subsequent amending legislation.

A "triangular" controversy

Mr. de Valera claimed that it would be an impertinence if the British Government were to claim as citizens of their country persons owing allegiance to the Free State in view of the Irish law. Mr. Thomas, on the contrary, while admitting the right of the Free State to define its citizens, challenged its power to deprive any British subject of the status he possessed presumably in terms of the resolution of the Imperial Conference, 1930.* In the course of an article in *The Manchester Guardian* on the subject Professor Keith observed that Mr. Thomas's dictum was in one sense beyond question. "If the United Kingdom," he wrote, "were internationally distinct from the Free State, it is clear that as far as international law was concerned, the State could not by legislation affect the international status of a British subject." But he thought that was not Mr. Thomas's point. The Dominions Secretary's thesis was interpreted to mean that, despite the Irish law, the vast majority of Irish citizens would remain British subjects. Professor Keith then proceeded to point out that it was certainly effective to deprive of British nationality in the State territory all persons whose status was as such merely statutory and did not rest on common law. He asserted, however, that the case of persons whose allegiance was natural by common law was undoubtedly open to argument.

Points in Professor Keith's thesis

Three points seem to have been emphasized by Professor Keith in connection with the Irish Citizenship Act. First, it was doubtful whether the Irish Free State could by legislation destroy the common status of Irish men and women as British subjects in places outside the Irish territory. Secondly, if the common status was based on the English Common Law in respect of any Irish citizens,

* While it was generally admitted that the abolition of the Oath in respect of the members of the Free State Legislature in no way affected the allegiance to the Crown of Irish citizens Mr. de Valera appeared to think that under the Act of 1935 the bond between the Crown and the Irish citizens had ceased to exist so far as the internal affairs of the State were concerned.

it was doubtful whether the Irish Free State could pass a measure effective to affect or to destroy that status. Thirdly, within the Irish territory the Free State was competent to act in defining its nationals in defiance of the provisions contained in the Imperial statutes relating to nationality.

No restriction on extra-territorial legislation

It is now for us to examine these three propositions. So far as the third proposition is concerned, we are on common ground with Professor Keith and are definitely of opinion that the Imperial authorities could not in law stand in the way of the Irish Free State defining its nationals and determining their status within the State territory. Any interference by the former would be not only against the law but against the usage that had been established in the Dominions and was bound to provoke hostility from all the Dominions.

It is with regard to the other two propositions that doubts have arisen. It had been recognised in Paragraph 78 of the Report of the Conference on Dominion Legislation, etc., that each Dominion had power to evolve its distinct nationality both within and without the Commonwealth. Professor Keith did not refer to that paragraph, but he *admitted in his letter to The Guardian with reference to the Imperial* Conference of 1930, which had adopted the nationality clause of the Report submitted a year before, that a Dominion was within its rights to define its nationals both for national and international purposes. It is true that the Canadian Nationals Act was necessitated by the Dominion's anxiety to have a seat on the Inter-national Court of Justice, but there is nothing in that Act or in any Imperial legislation suggesting that the distinct type of Canadian nationality would be internationally valid only in regard to the composition or personnel of the International Court save in so far as restrictions on its validity, if any, may have been incorporated in the Act itself. There is in other words no restriction on the extra territorial effect of any Dominion legislation pertaining to nationality. All doubt in this matter seems to have been removed by s. 3 of the Statute of Westminster.*

* "It is hereby declared and enacted that the Parliament of a Dominion has full power *to make laws having extra-territorial operation.*" *It is not to be supposed that*

Professor Keith was apparently aware of the force in this contention as was indicated by his remark that the responsibility for the situation be-

The effect of the Statute

from s 3 of the Statute alone is the power to legislate extra-territorially derived where that section has been applied as, for instance, in Canada, *Eire* and South Africa and that the Parliaments of Australia and New Zealand are incompetent to give their legislation extra territorial operation The position is that if the law in question can be truly treated as being necessary for the peace, order, and good government of the Dominion concerned, it is a perfectly valid law, it does not matter whether or not it seeks to operate extra territorially or whether or not in a particular Dominion s 3 of the Statute applies The phrasing of s 3 is positive, and not negative It accords the Dominions a direct power to make laws having extra territorial operation, leaving open the question as to what could, apart from the section itself, be the lawful extra territorial operation of any Dominion law It does not seem to have altered the legal position of the Dominions except to make it clear by legislation that the principle as laid down in *Macleod* v *Attorney General for New South Wales* does not bind the legislation of a Dominion The only consideration to be applied is that if the law possessing non-Dominion elements is also of Dominion concern, but only of concern to the local as distinct from the central or to the central as distinct from the local legislature, the Courts may, in the appropriate case, have to pronounce a central or local law respectively *ultra vires*, as not being a law for the peace, order, and good government with respect to any granted power As Evatt, J observes, whether s 3 operates retrospectively or not, it cannot be used as evidence that until the Statute of Westminster was passed, none of the Dominions could exercise their legislative powers so as to affect matters, things, and circumstances outside their territory Mr Justice Evatt seems to think, relying on the decision in *Attorney-General for the Commonwealth of Australia* v *Colonial Sugar Refining Co*, that the Australian States and, for that matter, the Canadian Provinces may also legislate extra territorially provided the subject matter of the legislation in question falls within their legislative competence, although the section does not apply to the legislatures of the Australian States or the Canadian Provinces In *Croft* v *Dunphy* the position as existing apart from the effect of the Statute of Westminster was examined by the Judicial Committee, and it was affirmed as a broad principle that the powers possessed were to be treated as analogous to those of "a fully sovereign State" so long as they answered the description of laws for the peace, order, and good government of the constitutional unit in question either generally or, in the appropriate case, in respect of subject-matters specified in the controlling Constitution [*The Trustees Executors and Agency Co, Ltd, and Another* v *The Federal Commissioner of Taxation* (1933), 49 C L R 220] Read the annotated edition of *The Statute of Westminster* by Robert P Mahaffy, pp 8 11 It appears from the Government of India Act, 1935, that the Federal Legislature in certain cases has, and a Provincial Legislature has not, power to legislate extra territorially (s 99) It may, however, be argued on the analogy of Dominion cases cited above that the Provinces, now that the Federal principle has been introduced, may legislate extra-territorially provided that the matters in question are within their legislative competence and that the legislation is essential to "the peace, order and good government" of the area concerned On the other hand, reliance may be placed on the doctrine laid down in *Merchant Services* v *Steamship Owners* (16 C L R 702) that "the true rule with respect to subordinate legislatures is that they will not be held to possess any extra territorial jurisdiction unless it is conferred on them expressly or by necessary implication" The point seems to be obscure and may give rise to doubts and disputes despite the provisions of s 99 and the statutory restrictions on the powers of Provincial authorities

longed to the British Parliament which had passed the Statute of Westminster without realising the effect of their own action and which had deliberately refrained from safeguarding from elimination by a Dominion Act the doctrine of common allegiance to the Crown But it is difficult to reconcile this statement to the suggestion made in his letter that outside the Irish territory an Irish Act defining the status of its own citizens for national and international purposes might not be *held valid* * Of course the Statute of Westminster gives the Irish Legislature no right to repeal or amend any British law *save in so far as it is part of the law of the Free State* But it is plain that Mr de Valera s Citizenship Act purported to repeal British legislation in so far as it affected Free State citizens and we cannot see how the Free State or *Eire* could be prevented by the Imperial authorities, especially in view of the provisions of s 3 of the Statute, from replacing for its citizens the status of British subjects for international purposes by a status created by its own law

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Nor is Professor Keith s reference to the English common law free from ambiguity There is no difficulty in the doctrine that the common law in regard to nationality as in regard to any other matter is in force only to the extent that it is not modified by sta

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tute, and Professor Keith was perfectly right when he argued that the common law regarding British nationality was practically superseded by Acts of Parliament and was not revived by their repeal wherever that repeal might take place. But there was a suggestion in his letter that if the law of British nationality were part of the common law of England, the Free State could not affect it by legislation. It means, in short, that the English common law is binding upon a Dominion Government. This view seems to be untenable. There is no reservation in the case of the Dominions in regard to the law of nationality. Their competence in this behalf, under the Statute of Westminster, does not appear to be open to any doubt.

S. 2 of that Statute expressly provides that the Colonial Laws Validity Act shall no longer apply to any law enacted by the Parliament of a Dominion. In order to put the matter beyond challenge it further lays down that "no law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the *law of England* or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion." Where then is force in the contention that the Irish Free State or, for that matter, the other Dominions, could not modify or alter the status of their own citizens which might have been based on the English common law?

International status of British subjects

We note, however, that Professor Keith in his letter to *The Guardian* did not state his proposition in this regard quite definitely, but there was a clear hint which appears to us to be inconsistent with the development and incidence of Dominion sovereignty. "If the United King-

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The position of European British subjects in India

Now although the common British law of nationality does not carry with it common rights privileges and liabilities in all parts of the Empire—in *Eire* it is claimed that the Imperial law has been abrogated in so far as it affected it—the position in India of European British subjects is different and has been so since the beginning of British rule here In addition to the rights enjoyed by all His Majesty s subjects European British subjects have enjoyed certain exclusive privileges in criminal law a subject which is dealt with elsewhere in this chapter

It has been seen that under s 2 of the Statute of Westminster those Dominions which have adopted it are entitled in law to enact legislation nullifying the Imperial Act of nationality or any Act of Parliament or any law of England in so far as the same is part of the law of those Dominions That power they may exer

cise, but even apart from the Statute itself action was taken by some of the Dominions to discriminate between different classes of British subjects No analogous power was given to India under the Government of India Act * Such power is deliberately denied under the India Act of 1935 †

The relevant section of the present Act provides that nothing in the Act shall be taken to empower the Federal Legislature or any Provincial Legislature to affect "the law of British nationality" That provision read with the power of Parliament to legislate for British India, or any part thereof,‡ leaves the Indian Legislatures, Central as well as Provincial, in a position of complete subordination to Westminster in an important sphere of municipal legislation It should be noted further that this section denies to those legislatures power to initiate legislation even with the previous sanction of the Governor-General or the Governor, a procedure provided for in s 108 The restrictions contemplated in ss 108-110 are more specific and detailed than those mentioned in s 65 of the repealed statute, although examined closely it does not appear that the rights have been curtailed save in so far as *specific* prohibitions may be construed as limiting, qualifying or destroying rights in respect of the matters specifically set out.

Indian legislatures have no power to affect the law of British nationality

What does "the law of British nationality" mean? In a broad and general sense, it may be interpreted to include both the statute law and the common law relating to nationality, and in this sense the legislatures in India are not competent to touch either the Parliamentary statutes that have so far been passed or may be passed in future or that residue of common law on the subject that has not yet been superseded by competent legislation In a narrow sense, the phrase may be construed to mean only common law as distinguished from statute law so that the competent legislature in terms of s 104 of the present India Act may be empowered by the Governor-General by public notification in the exercise

Distinction between "law" and "Act"

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longed to the British Parliament which had passed the Statute of Westminster without realising the effect of their own action and which had deliberately refrained from safeguarding from elimination by a Dominion Act the doctrine of common allegiance to the Crown. But it is difficult to reconcile this statement to the suggestion made in his letter that outside the Irish territory an Irish Act defining the status of its own citizens for national and international purposes might not be *held valid.** Of course the Statute of Westminster gives the Irish Legislature no right to repeal or amend any British law *save in so far as it is part of the law of the Free State.* But it is plain that Mr. de Valera's Citizenship Act purported to repeal British legislation in so far as it affected Free State citizens; and we cannot see how the Free State or *Eire* could be prevented by the Imperial authorities, especially in view of the provisions of s. 3 of the Statute, from replacing for its citizens the status of British subjects for international purposes by a status created by its own law.

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The relevant section of the present Act provides that nothing in the Act shall be taken to empower the Federal Legislature or any Provincial Legislature to affect "the law of British nationality." That provision read with the power of Parliament to legislate for British India, or any part thereof,‡ leaves the Indian Legislatures, Central as well as Provincial, in a position of complete subordination to Westminster in an important sphere of municipal legislation. It should be noted further that this section denies to those legislatures power to initiate legislation even with the previous sanction of the Governor-General or the Governor, a procedure provided for in s. 108. The restrictions contemplated in ss. 108-110 are more specific and detailed than those mentioned in s. 65 of the repealed statute, although examined closely it does not appear that the rights have been curtailed save in so far as *specific* prohibitions may be construed as limiting, qualifying or destroying rights in respect of the matters specifically set out.

Distinction between "law" and "Act."

What does "the law of British nationality" mean? In a broad and general sense, it may be interpreted to include both the statute law and the common law relating to nationality, and in this sense the legislatures in India are not competent to touch either the Parliamentary statutes that have so far been passed or may be passed in future or that residue of common law on the subject that has not yet been superseded by competent legislation. In a narrow sense, the phrase may be construed to mean only common law as distinguished from statute law so that the competent legislature in terms of s. 104 of the present India Act may be empowered by the Governor-General by public notification in the exercise

* s. 65 (2) (i).
† s. 110 (b) (i).
‡ s. 110 (a).

of his discretion to seek legislation affecting the statutes but leaving unimpaired the common law of England relating to nationality

That a distinction has been made between "law" and "Act" by the framers of the Act is apparent from the fact that while reference in the section is made to "the law of British nationality," there is mention therein of the Army Act, the Air Force Act and the Naval Discipline Act There may be support for the narrower interpretation in the provisions of s 2 (2) of the Statute of Westminster, 1931, as well of s 3 of the Colonial Laws Validity Act, 1865, in both of which Acts the law of England therein used was intended to exclude the statutes

Perhaps the wider interpretation is more sound in view of the fact that while giving the Federal Legislature power to legislate as to "naturalisation,"* the Seventh Schedule to the Act does not include "citizenship" or "nationality" in any of the three Lists into which the subjects have been classified for legislation. The powers of the Central Legislature under the Government of India Act as regards "naturalisation" have been retained for the Federal Legislature as envisaged under the new Act, and pending the inauguration of Federation, for the Central Legislature It appears that the framers of the Act were moved by an anxiety to preserve in India not only the status of British subjects as defined in the Imperial Act of 1914 but also the status that some may enjoy at common law on the analogy of Calvin's Case But the phrasing is unhappy and unfortunate and may lead to conflicts; and if, as it appears, the intention was to save both the statute law and the common law Parliament ought to have mentioned in the relevant section both "the law of British nationality" and "Acts relating to British nationality"

The Indian Naturalisation Act

The Indian Act of 1926 (Act VII) is a Naturalisation Act and principally intended for foreigners technically called aliens It confers upon the Local Government,† but in terms of the Government of India Act, 1935, read with the Government of

* List I item 49

† Local Government' has ceased to exist under the system inaugurated by the Act of 1935 The term now used is ' Provincial Government" Read s 311 (2)

India (Adaptation of Indian Laws) Order, 1937, the Central Government,* power† to grant a certificate of naturalisation to a person who makes an application in that behalf and satisfies the Government concerned that he is neither a British subject nor a subject of any State in Europe or America or of any State in which an Indian British subject is prevented by or under any law from becoming a subject by naturalisation, that he has, during a period of not less than five years immediately preceding the date of his application, either resided in British India or been in the service of the Crown in India, that he has an adequate knowledge of a language which has been declared by the Central Government to be " one of the principal vernaculars‡ of

* According to the adaptations made in the General Clauses Act, 1897, by the Government of India (Adaptation of Indian Laws) Order, 1937, " Central Government " shall (a) in relation to anything done or to be done after the commencement of Part III of the Government of India Act, 1935, mean the Federal Government, and (b) in relation to anything done before the commencement of Part III of the said Act, mean the Governor-General in Council, or the authority competent at the relevant date to exercise the functions corresponding to those subsequently exercised by the Governor-General in Council. " Federal Government " again shall (a) in relation to anything done or to be done after the commencement of Part III of the Act of 1935, but before the establishment of the Federation, mean, as respects matters with respect to which the Governor-General is by or under the provisions of the said Act for the time being in force required to act in his discretion, the Governor-General, and as respects other matters, the Governor-General in Council, and (b) in relation to anything done or to be done after the establishment of the Federation mean the Governor-General acting or not acting in his discretion, and exercising or not exercising his individual judgment, according to the provision in that behalf made by and under the Act. It shall include, in relation to functions entrusted under section 124 (1) of the Act to the Government of a Province, the Provincial Government acting within the scope of the authority given to it under that sub-section. " Provincial Government," as respects anything done or to be done after the commencement of Part III of the Act, shall mean (a) in a Governor's Province, the Governor acting or not acting in his discretion, and exercising or not exercising his individual judgment according to the provision in that behalf made by and under the Act; and (b) in a Chief Commissioner's Province, the Central Government, and as respects anything done before the commencement of Part III of the Act, shall mean the authority or person authorised at the relevant date to administer executive government in the Province in question. By the Interpretation Act, 1889, as amended by Order in Council, the expression " Governor-General " shall, when used in relation to British India or India, (a) in relation to the period between the commencement of Part III of the India Act and the establishment of the Federation, mean the Governor-General in Council; (b) in relation to any period after the commencement of Part III, be construed as including a reference to the Governor of a Province in India acting within the scope of any authority given to him under Part VI of the India Act.

† This executive power is derived from the Seventh Schedule, List I, item 49.

‡ The term " vernacular " is used in the Act. The expression seems to be offensive as being derived from *verna* which means the language of the home-born slave. When,

British India" and that he intends, if the application is granted, to reside in British India or to enter or continue in the service of the Crown in India *

Every person to whom a certificate of naturalisation has been granted, within thirty days from the date of the grant, shall take and subscribe to the oath of allegiance to the Crown provided that the time may be extended by the appropriate Government in certain cases † A naturalised subject is deemed a British subject and is entitled in British India to all the rights, privileges and capacities of a British subject born within British India except such rights, privileges and capacities, if any, as have been withheld from him by the certificate of naturalisation granted to him, and is subject to all the obligations, duties and liabilities of a British subject ‡

The appropriate Government have power to revoke any certificate of naturalisation issued by them on certain grounds The certificate, for instance, is liable to be revoked in the case of a naturalised subject who has, since the date of the grant of the certificate, been, for a period of not less than seven years, ordinarily resident out of His Majesty's dominions otherwise than as a representative of a British subject, firm or company carrying on business or of an institution established in His Majesty's dominions, or in the service of the Crown, and has not maintained substantial connection with His Majesty's dominions §

Different classes of British subjects in India

This Act in no way affects the law of naturalisation provided under the scheme of the 1914 Imperial Act which gives a naturalised British subject the status of a natural-born British subject

prior to amendment by Order in Council, the power was vested in the Local Government, the knowledge of a principal vernacular of the Province as declared by the Government concerned was one of the conditions laid down One of the principal vernaculars of British India has now been substituted for a principal vernacular of the Province In South Africa and Canada the knowledge of *Afrikaans* and French respectively on the part of a naturalised subject is deemed sufficient

* s 3 (1) of the Indian Naturalisation Act

† s 6 It should be noted that the functions in respect of sub section (3) of s 4, sub section (5) of s 8 and s 12 of the Indian Naturalisation Act have been entrusted to the Provincial Governments with their consent in exercise of the powers conferred by sub section (1) of s 124 of the Government of India Act, 1935, upon the Governor General (Notification No 228/37 dated the 1st of April, 1938)

‡ ss 5 (1) and 7 (1)

§ s 8 (2 d)

throughout the Empire subject to certain conditions in the case of the Dominions. The Indian law of naturalisation is an addition to, and not a derogation from, the Imperial Act of 1914 on the subject of "naturalisation." For the purposes of certain rights, exemptions or liabilities, as the case may be, the present India Act has evolved a rather novel method of classification based, more or less, on domicile. According to that classification there may be *inter alia* five classes of British subjects, viz., (1) those domiciled in India,* (2) those domiciled in British India,† (3) those domiciled in the United Kingdom,‡ (4) British subjects of any other domicile within the Empire, and (5) aliens naturalised as His Majesty's subjects in British India under the Indian Act of 1926 or the Imperial Act of 1914.

The status of aliens in India.

It is interesting in this connection to examine the status of aliens in British India. They owe temporary allegiance to the Crown and are entitled to the protection of Indian laws.§ But franchise, Provincial or Federal, is not extended to them and is restricted only to a British subject, the Ruler or subject of a Federated State and, if and in so far as it is so prescribed with respect to any Province, and subject to any prescribed conditions,|| the Ruler or a subject of any other Indian State. A person, however, is not qualified to be chosen as a representative of British India to fill a seat in the Federal Legislature unless he is a British subject or the Ruler or a subject of a Federated State provided that the Ruler or a subject of an Indian State, which has not acceded to the Federation, may fill a seat allocated to a Province if he would be eligible for membership of the Legislative Assembly of the Province, and in such cases as may be prescribed, may fill a seat allocated to a Chief Commissioner's Province.¶ The object of the proviso is in the main to throw open membership to subjects of Marwar many of whom

* s. 298 of the Government of India Act, 1935.

† Chap. III of Part V of the Government of India Act, 1935.

‡ *Ibid.*

§ *Johnstone* v. *Pedler* (1921), 2 A.C. 262; *De Jager* v. *Attorney-General for Natal* (1907), A.C. 326.

|| Sixth Schedule, Part I, para. 3; The Government of India (Provincial Legislative Assemblies) Order, 1936, Part I, para. 5; The Government of India (Provincial Councils) Order, 1936, Part I, para. 6.

¶ First Schedule, Part 1, para. 1.

have settled down in business in British India without acquiring British subjecthood by naturalisation or otherwise Like restrictions without that proviso apply in the case of representatives of Indian States to fill seats in the Federal Legislature,* that is to say, a person shall not be qualified to be appointed to fill a seat in either Chamber of the Federal Legislature unless he is a *British subject* or the *Ruler* or a *subject* of an Indian State *which has acceded to the Federation*

As regards the composition of Provincial Legislatures, the law provides that a person shall not be qualified to be chosen to fill a seat therein unless he is a British subject or the Ruler or a subject of a Federated State or, if it is so prescribed with respect to any Province, the Ruler or a subject of any prescribed Indian State † In this case also the object is to enable subjects of Marwar otherwise qualified to offer themselves for election to either House of a Provincial Legislature, and the provision seems to be a continuance of the rules made under the Government of India Act.

Exceptions to the general rule

The rule generally to be followed in regard to any office under the Crown in India is to exclude persons who are not its subjects,‡ but certain exceptions have been made For example, the Ruler or a subject of a Federated State shall be eligible to hold any Civil office under the Crown in India in connection with the affairs of the Federation § Again the Governor-General as regards the Federation or the Governor as regards his Province may declare|| that the Ruler or any subject of a specified Indian State or any native of a specified tribal¶ area or territory adjacent to India** shall be eligible to hold any Civil office, being an office specified in

* First Schedule Part II para 4

† Fifth Schedule para 1 (a)

‡ s 262 (4)

§ s 262 (1)

|| s 262 (1) and (2)

¶ In the Act unless the context otherwise requires Tribal areas means the areas along the frontiers of India or in Baluchistan which are not part of British India or of Burma or of any Indian State or of any foreign State [s 311 (1)] Such places for example, as Sikkim Bhutan and Tibet are tribal areas " within the meaning of the section

** For example, Nepal

his declaration.* The Secretary of State, on the other hand, is given power to declare that any named subject of an Indian State, or any named native of a tribal area or territory adjacent to India, shall be eligible for appointment by him to any Civil Service under the Crown in India to which he makes appointments; and any person who, having been so declared eligible, is appointed to such a service, shall be eligible to hold any Civil office.† Further, the Governor-General, or in relation to a Province the Governor, may authorise the temporary employment for any purpose of a person other than a British subject.‡ It should be remembered that in discharging his functions as contemplated in s. 262 the Governor-General or the Governor is required to act in the exercise of his individual judgment.§

An exception is also made in s. 234 under which the power of His Majesty, and of any person authorised in that behalf by His Majesty, to grant Commissions in any naval, military or air force raised in India extends to the granting of a Commission in any such force to any person (not exclusively a British subject) who might be, or has been, lawfully enlisted or enrolled in that force, a provision which should be read with s. 8 (b) and (c) (iii) of the Act. While the executive authority of the Federation extends, amongst other matters, to the raising in British India of naval, military and air forces and to the governance of His Majesty's forces borne on the Indian establishment, it does not extend to the enlistment or enrolment in any of those forces raised in India of any person unless he is either a British subject or a native of India or of territories adjacent to India. The right to being enlisted or en-

* Provisions as to "declaration" or British subjecthood did not apply for a period of twelve months from the date of the commencement of Part III of the Act to persons who immediately before the said date had been holding an office under the Crown [para. 15 of the Government of India (Commencement and Transitory Provisions) Order, 1936]. In order that subjects of Indian States may not be debarred from holding appointments contemplated in the section a resolution of the Congress Working Committee adopted in March, 1938, urged the exercise of the power by the authority concerned. That power has been exercised in a number of cases. Read the Government of India *notifications* published in the *India Gazette* in March, 1938.

† s. 262 (3).

‡ Proviso to s. 262 (4).

§ s. 262 (5).

rolled is thus extended to subjects of the Indian States and inhabitants of territories other than British, such, for instance, as the Gurkhas. Similar provisions have been made for the period of transition elapsing between the commencement of Part III of the Act and the establishment of the Federation.*

The Foreigners Act and its effect

Somewhat drastic powers are conferred upon the Central Government† by the Foreigners Act of 1864‡ as amended in 1915§ to prevent aliens from residing in British India or to order any foreigner to remove from British India. A foreigner, who refuses to remove or returns after removal, may be apprehended and kept in detention. In specified areas foreigners may be required to report their arrival and obtain licenses for travel, etc. Despite discriminations to which aliens are subjected in India, the English common law forbidding the ownership of "real property" by aliens has not been applied here.‖ But it is open to an appropriate legislature in India to enact legislation depriving aliens of the privilege to acquire rights in land.

The position of subjects of the States in British India is not free from ambiguity, although, as we have seen, the restrictions on aliens in respect of franchise, membership of legislatures or public authorities and appointments to offices under the Crown do not as a general rule and in their entirety apply to them. The Rulers themselves owe allegiance to the Crown. They are, however, immune from the jurisdiction of the courts in England,¶ but in Scotland** the courts refuse exemption for personal wrongs at least. In other words, they do not enjoy immunity in Scotland in respect of torts committed by them in their personal as opposed to sovereign capacity. In

* Proviso (ii) to s. 313 (2).

† The Provincial Government now have no power under the 1935 Act read with the Indian Laws Adaptation Order 1937. The executive authority of the Federation in this behalf may be entrusted to a Provincial Government with their consent under s. 124 (1) of the Government of India Act, 1935.

‡ Act III of 1864.

§ Act III of 1915.

‖ *Mayor of Lyons* v. *East India Co.* (1836) 1 Moo. Ind. App. 175.

¶ *Statham* v. *Statham and the Gaekwar of Baroda* (1912).

** *Ross* v. *Sir Bhagvat Sinhjee* (1891).

foreign countries subjects of the States are treated as British subjects* and entitled to British protection while internally, their territory not being British, they cannot be accepted as British subjects.

Discrimination against Indians in U.S.A.

The denial by statute to nationality even by naturalisation to the citizen of any State in Europe or America or of any State which refuses to admit to its citizenship any British Indian subject is rather significant in view of the interpretation that the expression "a free white person," used in the provisions for naturalisation in U. S. A., has received in judicial adjudications, especially in Mr. Justice Southerland's judgment in what is known as the Thind† Case. In delivering the judgment Mr. Justice Southerland observed *inter alia* :

> "We are unable to agree with the district court, or with other lower Federal Courts, in the conclusion that a native Hindu is eligible for naturalisation. The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of men which they knew as white.........There is much in the origin and historic development of the statute to suggest that no Asiatic whatever was included. What we now hold is that the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs."

That decision was cited as an authority for denying, in *In re Feroj Din* by the district court for the Northern District of California, naturalisation to an applicant who was a native of Afghanistan.‡ The judgment in the Thind Case states the present law and the effect thereof was to nullify in law and in fact the naturalisation, acquired on the authority of certain judgments§

* 53 & 54 Vict. c. 37, s. 15.
† *United States* v. *Thind*, 291 U. S. 204, 213 (1923).
‡ 27 Fed. (21) 568 (1928).
§ *In re Mohan Singh*, 257 Fed. 209, 213 (1919).

of lower courts, by a large number of Indians who had settled there It appears, therefore, that the provisions of the Indian Naturalisation Act of 1926 in effect forbid naturalisation to citizens of U S A especially having regard to the interpretation that the existing American law has received from the Supreme Court

The European demand for safeguards in British India

Let us now see what the European demand for safeguards against commercial discrimination in British India amounts to The question was hotly discussed at the annual meeting of the Associated Chambers held in December, 1928 In July, 1928, they addressed a memorandum to the Simon Commission which was circulated among members of Parliament and commercial bodies in England The memorandum insisted on a definite and clear provision for the protection of European trade and commerce against discrimination In October, 1929, the Federation of Indian Chambers and Industry issued a rejoinder to the memorandum of the Associated Chambers in which the former body made it clear that "there can be no self-government in India if she is to be denied the power to devise and follow a national economic policy, including the right, if her interests require it, for making economic discrimination against non-national interests" In July, 1930, the Associated Chambers again came forward with a circular protesting vehemently against discrimination in trade and commerce

The Simon Commission, on the evidence placed before them, definitely ruled out the proposal for preventing such discrimination by attempting to define it in a constitutional instrument Referring to the drafts and clauses which had been submitted before them by the European Association and the Associated Chambers of Commerce and which those two bodies desired to be incorporated in the Constitution, the Statutory Commission observed

> We have given careful consideration to their proposals but there are objections to securing protection by the means they suggest to which we can find no answer Many other interests have asked for similar constitutional safeguards and we are clear that statutory protection could not be limited to particular minorities or to discrimination in matters of trade and commerce only The statutory provision would therefore have

to be drawn so widely as to be little more than a statement of abstract principle affording no precise guide to courts which would be asked to decide whether a particular group constitute a minority, and whether the action complained of was discriminatory...............These objections are decisive against the proposal to prevent discriminatory legislation by attempting to define it in a constitutional instrument."*

In the Minorities Sub-Committee of the First Round Table Conference the principle of protection against discrimination was generally accepted by all sections of the delegation. The principle found expression in a memorandum submitted on behalf of the "depressed" classes,† and also in the speech of Sir Hubert Carr who represented the European community in India at the Round Table Conferences.

Sir Hubert Carr said:

"We are not asking for any rights or privileges for our own community; we simply want to be recognised to have exactly the same rights—when I say 'we' I refer to those of us from Great Britain and Northern Ireland—as any of His Majesty's subjects in India with regard to commerce and industry. That is a point which we do not attempt to make on behalf of all citizens of the British Empire. We recognise the position of India and we feel that it should be open to the Indian Government to make such arrangements as it wishes to make with other parts of the Empire who may discriminate against India. Therefore, my claims are made on behalf of those from Great Britain and Northern Ireland."‡

No restrictions on Indian Fiscal policy.

As for Indian fiscal policy, his views were expressed in these words: "We are not wishing in any way to attempt to put any restrictions upon Indian fiscal policy. If India wishes to go in for a tariff wall, she must be allowed to decide her own destiny, but behind that wall we would expect to be allowed to work in exactly the same way as Indians."§ Then he proceeded to criti-

* The Simon Commission Report, Vol. II, pp. 129-30.

† The Sub-Committee's Report (Minorities), Vol. III, p. 171.

‡ *Ibid.*, p. 39.

§ *Ibid.*

cise the policy recommended by the External Capital Committee who expressed the desire that the Government of India should insist on a certain percentage of Indian Directors and Indian Capital and Indian Staff in industrial undertakings of a particular type and in certain circumstances Sir Hubert stated

> We would not possibly accept that as any basis whatever for the treatment of British commerce in India To start with, we do not believe it is really practical to insist upon a certain number of Indian directors As regards capital, we claim absolutely equal rights for starting rupee companies except when Government makes specific financial assistance to some concerns then we recognise obviously the right to demand that that capital shall be rupee capital, but indiscriminate instances of this point would only militate against the standard of various useful institutions such as Banks Insurance Companies, etc, and would achieve no good object in our opinion *

A reciprocal Treaty

Lastly, Sir Hubert put in a plea before the Conference for a comprehensive reciprocal Treaty between the Government of Great Britain and the Government of India covering immigration, settlement, residence, travel, exercise of any form of occupation, carrying on of any kind of business or acquisition of any kind of property—a Treaty which must guarantee to European British subjects in India and His Majesty's Indian subjects in the United Kingdom an absolute equality of position and status in commercial and industrial matters

The Minorities Sub-Committee approved in principle of the proposal for a comprehensive commercial Treaty between the United Kingdom and India on a reciprocal basis and the maintenance of the *status quo* in regard to the privileges in criminal trials enjoyed by members of the European community in British India Their recommendation embodied in Paragraph XIV of their Report was amended by the Committee of the whole Conference at their meeting in the following words †

> At the instance of the British commercial community the principle was generally agreed that there should be no discrimina-

* The Sub Committee's Report (Minorities), p 40

† Mr M A Jinnah dissented from this view

tion between the rights of the British mercantile community, firms and companies trading in India and the rights of Indian born subjects, and that an appropriate Convention based on reciprocity should be entered into for the purpose of regulating these rights.

It was agreed that the existing rights of the European community in India in regard to criminal trials should be maintained."*

The Round Table formula and statutory safeguards.

At the Second Round Table Conference representatives of the minorities in India including Muslims, Europeans, Anglo-Indians and depressed classes submitted a joint memorandum to the Prime Minister urging the need for the protection of the rights of minorities and giving a detailed scheme for the purpose which His Majesty's Government incorporated in the proceedings of the Conference. In that memorandum it was proposed that "statutory safeguards shall be incorporated in the Constitution protecting all against discrimination in legislative enactments affecting any community." The exact formula evolved at the Round Table Conference regarding commercial discrimination has not been incorporated in the White Paper or in the Government of India Act, 1935.

But the broad principle underlying that formula, *i.e.*, that of protection against commercial discrimination has been accepted;† and it will be seen that apart from his exclusive responsibility for the Reserved Departments dealt with in Paragraph 11 of the White Paper and s. 11 of the Act the Governor-General in administering the entire Government at the Centre has "special responsibilities"‡ in respect of the following, amongst other, matters, namely, (1) the safeguarding of the legitimate interests of minorities, (2) the securing in the sphere of executive action of the purposes which the provisions of Chapter III of Part V of the Act (ss. 111-121 dealing with provisions with respect to discrimination, etc.), are designed to secure in the sphere of legislation, and (3) the prevention of action which would sub-

* The Report of the Round Table Proceedings, Vol. III, p. 158. For fuller discussion read the Report of the Round Table Proceedings, Vol. II, pp. 1036-1131.

† Paras. 122 and 123 of the White Paper; ss. 111-121 of the India Act, 1935.

‡ Para. 18 of the White Paper; s. 12 (1) (c), (e) and (f) of the Act.

ject goods of United Kingdom or Burmese origin imported into India to discriminatory or penal treatment Identical responsibilities *mutatis mutandis* are conferred upon a Provincial Governor * The Act, therefore, guarantees safeguards against both legislative and administrative discrimination

The nature and scope of legislative protection

As regards legislative protection against discrimination in taxation, the Act provides that without the previous sanction of the Governor-General acting in his discretion no Bill or amendment shall be introduced into the legislature which subjects persons not resident in British India to greater taxation than persons resident in British India or subjects companies not wholly controlled and managed in British India to greater taxation than companies wholly controlled and managed therein † The object of this clause is not to prohibit discrimination in taxation as such as between persons referred to but to prevent discrimination of a particularly severe type It is intended to protect persons who earned and saved money by carrying on a profession or conducting a trade while they were resident in British India and who have ceased any longer to reside in the country It applies to companies as well as to individuals In different countries non-residents are taxed in varying degrees of severity, and in British India the appropriate legislature is not prevented from enacting laws taxing non-residents or subjecting them to discriminatory treatment in taxation as distinguished from residents That power belongs to it subject to the Governor-General's intervention

A British subject domiciled in the United Kingdom is exempt from that portion of any Federal or Provincial law ‡ which (a) imposes restriction on the right of entry

* s 52 (1) (b) and (d)

† s 108 (1) (f)

‡ Under s 311 (2), unless the context otherwise requires Provincial Act and Provincial Law mean subject to the provisions of the section an Act or law made by a Provincial Legislature established under the Government of India Act 1935 Read in this connection the provisions relating to the legislative powers of a Governor and the Governor General made in Chapter IV of Part III (ss 88 90) Chapter IV of Part II (ss 42 44) and s 311 (6) of the Act Federal Act and Federal law are not defined in the section but reliance may be placed in construing these terms on the General Clauses Act 1897, as amended by Order in Council (s 8aa read with s 8ac)

into British India, or (*b*) imposes by reference to place of birth, race, descent, language, religion, domicile, residence or *duration* of residence, any disability, liability, restriction or condition in regard to travel, residence, the acquisition, holding or disposal of property, the holding of public office, or the carrying on of occupation, trade, business or profession.* But the protection goes by virtue of proviso to sub-section (1) of the section if a Crown's subject of British Indian domicile is subjected to any disability, liability, etc., in regard to the same matter imposed on the same ground under the law of the United Kingdom by reference to the same principle of distinction.

By sub-sections (2) and (3) of the section the right of entry on the part of a British subject, wherever domiciled, is to a certain extent curtailed. Sub-section (2) saves any law of British India empowering any public authority to impose quarantine regulations, or to exclude or deport individuals, wherever domiciled, who appear to that authority to be "undesirable" persons. The latter sub-section authorises the Governor-General or, as the case may be, the Governor, acting in his discretion, to notify the suspension of the right of free entry into British India or other rights guaranteed under sub-section (1) of the section for the prevention of any grave menace to the peace or tranquillity of any part of India or of any part of a Province, or for the purpose of combating crimes of violence intended to overthrow the Government. Both by law and executive action can the provisions of sub-section (1) of the section be nullified in certain circumstances.

The section seems to suffer from a somewhat clumsy draftsmanship and the qualifications are vague and wide. Professor Keith is right in pointing, upon the analogy of restrictions imposed by certain Dominions on Indian immigration on economic grounds,† to the possibility of Indian attack on this score. There is nothing in the relevant section, it is submitted,

* s. 111 (1). It appears that discrimination on grounds of caste or colour is not protected against; nor is there any restriction on the competent legislatures in respect of discriminatory legislation on the ground of non-continuity of residence, for only duration of residence is specifically mentioned for the purposes of protection.

† Keith: *A Constitutional History of India*, p. 378.

that may be construed as preventing a legislature in British India from empowering by legislation an appropriate public authority to deport British subjects domiciled in the United Kingdom or elsewhere or refusing them entry on the ground that they are politically or from economic considerations or otherwise " undesirable " persons. But if in any given case the Governor-General or the Governor, as the case may, may have grounds for suspicion that the power as to quarantine regulations or the right to exclude or deport individuals is being used for the purposes of *discrimination*, he can intervene in exercise of his " special responsibilities "* for the protection of minorities overriding the advice of his Ministers. No such protection is possible in the United Kingdom for British subjects domiciled in British India from the very nature of the British constitutional system where the King in fact cannot as a general rule interfere with the activities of his Ministers. This disparity only brings out in bold relief the restricted scope of reciprocity between British India and the United Kingdom.

Discrimination in taxation prohibited

Discrimination in taxation against British subjects of United Kingdom or Burma domicile and against companies incorporated under the laws of either of those countries, whether before or after the passing of the Constitution Act, is prohibited. A law becomes discriminatory within the meaning of the section should it result in heavier taxation on such persons or companies as specified in the section than that to which they would be liable if domiciled in British India or incorporated under the laws of British India, as the case may be.†

It would be difficult, if not impossible, under this section to resist successfully any legislation imposing as in Australia a penal and discriminatory taxation on non-resident subjects; for evidently it does not, as Mr. Molson made it plain in Parliament, seek to prevent discriminatory taxation being levied in British India provided it was based on some ground other than *domicile*. Thus the right of the Indian Legislatures, Central or

* ss. 12 and 52.

† s. 112 (2). For Burma read s. 46 of the Government of Burma Act, 1935.

Provincial, to tax on this principle, even if the taxation imposed may be of a discriminatory character, has at least by implication been conceded.* There is, however, some protection against penal or grossly discriminatory treatment in s. 108 (1) (f). It will be seen that s. 112 makes no provision for reciprocal treatment so that discrimination in British India is prohibited whether or not in the United Kingdom British subjects domiciled in British India or companies incorporated under any Indian law are subjected to discriminatory taxation.

Safeguards for companies.

Companies, incorporated, whether before or after the passing of the Constitution Act, under the laws of the United Kingdom, their directors, holders of shares, stock, debentures, debenture stock or bonds and their officers, agents and servants are to be deemed to comply with any Federal or Provincial requirements or conditions relating to or connected with the place of incorporation, the situation of its registered office or the currency in which its capital or loan capital is expressed, or the place of birth, race, descent, language, religion, domicile, residence or duration of residence of the directors, etc., which might be imposed in regard to companies carrying on or proposing to carry on business in British India.† If partial or total exemption from, or preferential treatment in respect of, taxation‡ is provided at the Centre or in the Provinces on compliance of the conditions as set out in the preceding sub-section, the relief must go also to British companies. In either case, however, the guarantee becomes void if reciprocity is not given to British Indian companies in the United Kingdom. The object of the section, to put it in non-technical language, is to accord equality of treatment to British and Indian companies alike. But there seems to be a loophole in this section despite the apparent care with which it has been drafted, for example, discrimination in respect of the amount of capital and loan

* *Commons Committee Debates*, March, 1935.

† s. 113 (1).

‡ s. 113 (2). Under s. 311 (2), unless the context otherwise requires, " taxation " includes the imposition of any tax or impost, whether general or local or special, and " tax " shall be construed accordingly.

capital, caste or colour, continuity of residence as distinguished from duration of residence is not forbidden

The same protection is given to companies formed by British subjects domiciled in the United Kingdom but incorporated by and under the laws in British India as distinguished from companies incorporated by and under the laws of the United Kingdom on the basis of reciprocity but with the same lack of clearness in respect of certain matters * The intention underlying s 114 is, as the Attorney-General put it in the Commons Committee, " to do for companies incorporated in India but with British capital and British directors, precisely the same as is done by clause 113 for companies registered in the United Kingdom carrying on business in India "† The legal effect is that both these classes of companies, that is, (*i*) companies incorporated and registered in the United Kingdom, and (*ii*) companies incorporated and registered in British India with British capital and British directors, are put on the same basis in the matter of safeguards, and as a general rule there can be no preferential treatment by legislation or executive action for genuine Indian concerns to the prejudice of the companies aforesaid, whether incorporated and registered before or after the passing of the Constitution Act The protection applies not only to companies already incorporated but also to the *incorporation* of a company In other words, no law, Federal or Provincial, will be valid which seeks to prevent the *incorporation* of a company contemplated in the section

Safeguards for companies incorporated in British India

But in respect of any grant, bounty or subsidy paid out of the Federal or Provincial revenues an exception is made in the case of those companies not engaged in that branch of trade or industry, which it is the purpose of the grant, bounty or subsidy to encourage, at the time when a Federal or Provincial law is passed inaugurating the system of direct financial assistance or aid In such cases the competent Legislature may require that the company concerned must be incorporated by or under the laws of British India or of a

Special provisions in respect of direct aid

* s 114

† *Commons Committee Debates* March, 1935

Federated State, that a proportion of the directors, not exceeding one-half of the Board, must be British subjects of Indian domicile or, if the Act so provides, must be such subjects or subjects of a Federated State, and that reasonable facilities must be given for the training of British subjects domiciled in India or, if the Act so provides, for the training of such subjects or subjects of a Federated State.*

The Congress Committee's misapprehension.

Subject to the provisions of sub-section (2) of s. 116 referred to above, British companies or companies managed, controlled and financed by British subjects of the United Kingdom domicile carrying on business in India cannot be discriminated against in regard to direct State aid for the encouragement of an industry to the advantage of Indian companies provided that the latter carrying on business in the United Kingdom are not subjected to discrimination. This provision applies to companies incorporated either before or after the passing of the Constitution Act.†

Attention was called by the Congress Working Committee in a resolution passed in March, 1938, to the adoption in recent months by British or foreign companies of such designations as " India Ltd., etc." while carrying on business in this country. The Committee held that it was a device to rob genuine Indian concerns of the advantages to which they were entitled under the policy of " discriminating protection " followed for some years past by the Government of India for the purposes of development of national industries. The Committee's view was apparently based on a misconstruction of the purpose and scope of the scheme of " discriminating protection." Discriminating protection as such permitted no discrimation against British trade or commerce in British India except when direct financial aid formed part of the scheme. Technically, it required the fulfilment of certain conditions on the part of an industry claiming protection. The protection granted, on the fulfilment of those conditions, was available to any company, whether British or Indian. The

* s. 116 (2).
† s. 116 (1).

present move of a certain number of British concerns engaged in trade or business in British India is rather a contrivance to circumvent the provisions of s 116 (2) of the Government of India Act, 1935, so that if and when a subsidy or bounty is given they may enjoy it along with genuine Indian concerns

For the purposes of s 116 a British company shall be deemed to be carrying on business in India if it owns ships which habitually trade to and from ports in India *

Protection against rule making powers

The provisions set out in ss 111-116 shall apply in relation to any ordinance, order, bye-law, rule or regulation passed or made after the passing of the Constitution Act† and having by virtue of any existing law, or of any law of the Federal or any Provincial Legislature, the force of law as they apply in relation to Federal and Provincial laws, but save as aforesaid, nothing in those provisions shall affect the operation of any existing Indian law ‡ This section is intended to secure in the sphere of subordinate or delegated legislation or executive or administrative action under the existing Indian law or any Federal or Provincial law what the preceding sections of the chapter are designed to secure in the sphere of superior legislation either at the Centre or in the Provinces There is thus protection against discrimination by legislation or rule-making powers In so far, therefore, as the laws passed by the Legislatures, Federal or Provincial, and the rules made by subordinate or executive authorities under any such law or any existing Indian law are repugnant to the provisions with respect to discrimination, they are invalid and inoperative

* s 116 (3)

† s 117

‡ Existing Indian law unless the context otherwise requires means any law ordinance order bye law rule or regulation passed or made before the commencement of Part III of the Act by any legislature authority or person in any territories for the time being comprised in British India being a legislature authority or person having power to make such a law ordinance order bye law rule or regulation [s 311 (2)] The laws in force in British India or in any part of British India are protected (s 293), subject to modifications and adaptations made by Order in Council (s 3 of the Adaptation of Indian Laws Order, 1937) until repealed or amended by a competent legislature or other competent authority

Ship and Air craft

It is provided that a ship registered in the United Kingdom shall not be subjected to any discriminatory treatment under a Federal or Provincial law in respect of her master, officers, crew, passengers or cargo to the advantage of a ship registered in British India unless there is like discrimination in the United Kingdom against a British Indian ship * The same principle applies to air-craft On the doctrine stressed by Professor Keith that " prohibition of discrimination on specific grounds is a definite intimation that discrimination on other grounds is licit,† discriminatory measures may be adopted in respect of tonnage, which is not mentioned in the section The only safeguard in respect of the currency of the capital or loan capital, so far as ships and air-craft are concerned, seems to be provided by sub-section (3) of s 115 where it is laid down that " the provisions of this section are in addition to and not in derogation of the provisions of any of the preceding sections of this chapter " For cl (a) of sub-section (1) of s 113 provides that protection But there is no protection as to tonnage, caste or colour or even the amount of capital or loan capital

Indo British Trade by Convention

Reference has already been made to the regulation of Indo British trade by Convention on a reciprocal basis as recommended at the first session of the Round Table Conference, but while abandoning that formula the Act has provided that the operation of the preceding sections‡ may be suspended by Order in Council, should a reciprocal Convention be agreed upon between His Majesty's Government in the United Kingdom and the Federal Government in India, after the establishment of the Federation, and should necessary legislation be passed both in the United Kingdom and in India to give effect to the Convention, to the extent that the purposes of those sections have, to His Majesty's satisfaction, been fulfilled by that Convention and legislation § By the Convention " similarity of treatment " must be assured in the United King-

* s 115

† Keith *Letters on Imperial Relations etc* p 204

‡ ss 111 117

§ s 118

dom to British subjects domiciled in British India and to companies incorporated by or under the laws of British India, and in British India to British subjects domiciled in the United Kingdom and to companies incorporated by or under the laws of the United Kingdom, respectively, in respect of the matters, or any of the matters, with regard to which provision is made in the sections. The Order in Council in question shall cease to have effect if and when the Convention to which it relates expires or is terminated by either party.

One or two points involved in s. 118* deserve notice.

A Convention cannot eliminate statutory protection.

It is not clear, for example, whether "similarity of treatment" means equality of treatment. Nor can it be said with anything like precision if the Convention which may be agreed upon between His Majesty's Government in the United Kingdom and the Federal Government in India can both reduce and increase the extent of safeguards provided in the preceding sections of the Chapter or is intended only to increase and not to reduce them. What is clear is that the Convention cannot eliminate the statutory protection absolutely or leave the authorities in India free to subject British subjects of United Kingdom domicile or British companies, as the case may be, to grossly discriminatory treatment to frustrate the purposes of the Chapter.†

Unsatisfactory as the Round Table formula was in certain respects from the Indian standpoint, the provisions of Chapter III of Part V read with the "special responsibilities" of the Governor-General or the Governor seek to impose far more "oppressive and unfair restrictions" and are, therefore, decisively worse than the original Convention formula. In the first place, so many details are specified in the Act that they take away from the legislatures many of their legitimate functions in a self-governing country. It does not mean, however, that the legislatures will find it absolutely impossible to discover lacuna in the Act and exploit it, if necessary, to the prejudice of British subjects of United Kingdom domicile or British companies. Apart from defective

* *Cf.* Professor Keith's Draft for insertion in the Indian Constitution. (Keith's *Letters on Imperial Relations*, etc., Footnote to pp. 220-221).

† *Commons Committee Debates*, March, 1935.

phraseology of the sections, Federal or Provincial authorities, as the case may be, may defeat the purpose of the Chapter by undertaking the management and control of certain kinds of business or providing under s. 299 for the compulsory acquisition for public purposes of any commercial or industrial undertaking. Of course Indian capitalists or businessmen will derive no advantage from such a policy, but the entrenched position of the European business community may thereby be seriously affected, if not completely destroyed.

In the second place, there is danger in the refusal to the parties concerned access to the courts to test the validity of executive or administrative action taken by the Governor-General or the Governor. The result is that the Governor-General or the Governor may destroy Ministerial responsibility by overruling his Ministers on every conceivable occasion or that he may submit tamely to their dictation, neither of which it is the purpose of the Act to encourage. The provisions have left room for administrative deadlocks which could have been avoided had the courts been given jurisdiction to pronounce upon doubtful cases in the sphere of executive action as in that of legislative enactments. The Governor-General or the Governor's "special responsibilities" will, on the one hand, lead the Ministers to think that their responsibility is only a pretence and will, on the other hand, create in the minds of the British community the feeling that protection against executive discrimination is an illusory safeguard under the system of responsible government enshrined in the Act. The position, to say the least, is anything but satisfactory and the provisions indicate a futile attempt at reconciliation of conflicting interests. A Convention, subject to the interpretation of the courts, would, however, promote more friendly relations on both sides.

Provisions as regard professional or technical qualifications

By s. 119 prior sanction of the Governor-General or the Governor acting in his discretion to Federal or Provincial legislation, as the case may be, is required for prescribing professional or technical qualifications for the practising of any profession, the carrying on of any occupation, trade or business

or the holding of any office in British India. No sanction shall be given unless he is satisfied that provision has been made to save the rights of any person lawfully practising any profession, etc., at the time provided that the rule may be abrogated in public interest. Those coming subsequently may or may not be protected. All " regulations " made under Federal or Provincial legislation, which would include rules, bye-laws, orders and ordinances, must be published not less than four months before they are expressed to come into operation. Complaints against them may be made by the person affected within two months from the date of publication to the Governor-General or the Governor, as the case may be. If he is of opinion that the complaints are well founded, then the regulations or any of them may be disallowed by public notification in the exercise of his individual judgment. These provisions apply to the " regulations " that may be made under any existing Indian law.

Provisions as to medical qualifications.

S. 120 deals with medical qualifications.* It is designed to guarantee security to British medical practitioners so that the European community in India, official or non-official, might not be deprived of their services or assistance, if they so desired. The guarantee in British India to the holders of a British medical diploma, being British subjects domiciled in the United Kingdom or India, is subject to the condition specified in sub-section (3) of s. 120. It lays down that His Majesty's subjects of Indian domicile may be registered in the United Kingdom as qualified medical practitioners and shall not be excluded from practising medicine, surgery or midwifery in that country if they hold a diploma granted after examination in British India except on the ground that the diploma does not furnish a sufficient guarantee of the possession of the requisite knowledge and skill. The exclusion of such medical practitioners in the United Kingdom may be justified on that ground so long as the law in the United Kingdom makes

* Read the provisions of the British Medical Act, 1886, and the Indian Medical Council Act, 1933, and paragraphs 361, 362 and 363 of the Joint Parliamentary Committee's Report.

provision enabling the issue as to the adequacy or sufficiency of the diploma to be referred to and decided by the Privy Council

Exclusion from registration or practice shall not be valid until the expiration of twelve months after notice of the exclusion has been given to the Governor-General and to the University or any other body granting the diploma,* and unless the Privy Council has held that the diploma is not sufficient evidence of requisite knowledge and skill Qualified practitioners must not in the practice of their profession in one country be subjected to any liability, disability, restriction or condition to which such practitioners are not subject in the other country †

A commissioned officer on the active list in the Indian Medical Service or any other branch of His Majesty's forces‡ shall by virtue of his commission be deemed to be qualified to practise medicine, surgery and midwifery in British India, and be entitled to be registered in British India as so qualified § The object of the section is, first, to utilise in India his services or assistance from the military point of view and, secondly, to make them available to the civil population, especially the British community, official or non-official The provision for reference to the Privy Council sitting practically as an original Court made in s 120 is not satisfactory inasmuch as matters in question raise issues of a highly technical nature which could be successfully handled only by an Indo British tribunal of medical experts, subject, if necessary, to the revisionary jurisdiction of the Privy Council Otherwise there is not much that is unfair or unduly restrictive in the section

The scope of the Chapter

Although, as we have seen, there is at certain points a gap in the Act, in so far as it seeks to prevent discrimination, which might be exploited for the purpose of obstructing in the legislative sphere and frustrating in effect

* Diploma includes any certificate degree fellowship or other document or status granted to persons passing examinations [s 120 (7)]

† s 120 (4) Of course there is no saving for exclusion on the ground of misconduct [sub section (6)]

‡ For example the Royal Army Medical Corps and the Royal Air Force Medical Service

§ s 121

the "special responsibilities" of the Governor-General or the Governor in the executive sphere, the fact cannot be denied that the statutory provisions in that regard are extremely wide and based on suspicion and mistrust. They constitute a negation of self-government and a concession to the British community both in the United Kingdom and British India which is neither fair nor reasonable having regard to the existing position of Indian Trade and Industry and the set-back it received during the early stages of the British Indian administration.

It should be noted that the protection provided in Part III of Chapter V of the Act does not extend to British subjects of Canadian, Australian, South African domicile or to the citizens of *Eire* or to any British subjects in any part of the Empire except those specified in the relevant sections so that it is open to the authorities in British India to discriminate against them. But no discrimination is permitted by or under the Act against a company controlled, managed or financed by Canadians, Australians, South Africans or any other people, whether within His Majesty's allegiance or not, provided the company is incorporated and registered by or under the laws of the United Kingdom.

The rôle of Instruments of Instructions in matters of commercial discrimination.

The issues raised in this Chapter have been sought to be clarified to some extent in the Instruments of Instructions to the Governor-General* and the Governors.† As regards the Governor-General's responsibility for the prevention of measures subjecting goods of United Kingdom origin imported into India to discriminatory or penal treatment, certain principles are emphasised in the Instrument. That action must be avoided by the Governor-General which might affect the competence of the Federal Government and of the Federal Legislature to develop their own fiscal and economic policy. Nor must he restrict their freedom to negotiate Trade agreements with different countries including the United Kingdom to secure mutual tariff concessions. It is further laid down that he should always bear in mind, in interpreting his "special responsibility" in this regard, the partnership

* cl. XIV.

† cl. XII.

between India and the United Kingdom within the Empire which has so long subsisted, and the mutual obligations which arise from it But those principles should be read with the directions to the Governor-General as to when he should intervene He should, for example, intervene in tariff policy or in the negotiation of tariff agreements only if in his opinion the main intention of the policy contemplated is by trade restrictions to injure the interests of the United Kingdom rather than to promote and advance India's economic interests

The discriminatory or penal action mentioned in the "special responsibility" section* is to be interpreted as including both direct discrimination (whether by means of differential tariff rates or by means of differential restriction on imports) and indirect discrimination (by means of differential treatment of various types of products) Apart from the prohibition of differential tariff schedules for different countries to the prejudice of the United Kingdom goods, the Governor-General is directed to prevent the imposition in India of prohibitory tariffs or restrictions if he is satisfied that such measures are designed to injure British interests His "special responsibility" extends, subject to the intention of the measures, to action which, though not discriminatory or penal *in form*, would be so *in fact*

As for trade agreements between India and other countries, it is contemplated that greater concessions must not be given to foreign imports than to British imports thereby negating the granting by India of the most-favoured nation clause to a foreign country to the prejudice of the United Kingdom It is significant that the responsibility is deliberately cast on the Governor-General to go into the motive of every measure, a responsibility which it would be extremely difficult for any Governor-General to discharge to the satisfaction of the parties concerned, especially when he is required to rely for his guidance not only on the form of action but also on its possible effect in fact In the hands of a perverse Governor-General, the Instructions are bound to hinder national progress and development, in those of a well intentioned but tactless Governor-General

* s 12 (1) (f)

they may prove an instrument of injustice, if not of mischief. In either case, there will be frequent conflicts between him and the responsible Ministers producing deadlocks in administration.

Viewed in the light of the Governor-General's powers the provisions incorporated in sub-section (2) of s. 116 of the new Act become practically illusory safeguards for development of Indian trade and industry. A Governor-General may read or be encouraged to read a sinister motive into a legislative measure or administrative action sponsored by a Ministry to advance the cause of Indian trade and industry and render it null and void in the discharge of his "special responsibility." On the other side also, he may be coerced by his Ministers into lending his support to a discrimitory measure against British imports or British companies carrying on business in British India. Should he refuse to listen to his Ministers he might run the risk of being censured or even recalled, especially when the Socialists may be in power in the United Kingdom.

The Governor's "responsibility" in this behalf is to be construed by him as requiring him to differ from his Ministers in the executive sphere if in his individual judgment (which constitutionally means the Governor acting after Ministerial consultation but, if he differs, on his sole responsibility) their advice would have effect of the nature which it is the purpose of Chapter III of Part V of the Act to prevent in legislation, even though the Ministerial advice so tendered to him is not in conflict with any specific provision of the Act. The criticisms urged in connection with the Governor-General's "responsibility" also apply generally in this case.

Instruments of Instructions leading to constitutional changes in Colonies.

It would not be out of place to recall here the part that the Instruments of Instructions have played in the development of Colonial self-government. To give one instance, after the passing of the Act of 1840 uniting as it did Upper and Lower Canadas the new Governor-General was authorised through the Instrument to "call to his counsels and employ in the public service those persons who, by their position and character, have obtained the general esteem of the in-

habitants ' It was intended that the Governor-General should as a general rule act on Ministerial advice The doctrine enunciated in the Instrument received a set-back at the hands of Lord Metcalfe during 1843 45, but in 1847, when Lord Elgin assumed the office of Governor-General, he was authorised again by Instructions to make responsible government as effective as possible in the circumstances Royal Instructions have, therefore, been acclaimed by competent authorities as a source of responsible government in the Colonies In a book published in 1928* after the Imperial Conference resolution of 1926 Professor Keith wrote "The Governor is required not merely to act according to law, but also, subject, of course, to the law, to follow the instructions of the Crown This appears in the Letters Patent constituting his office as well as his Commission,† and there can be no doubt, despite Mr Higginbotham's plea to the contrary, that he is bound to obey his instructions, though disobedience does not invalidate his actions "

Are Instructions a direct instigation to violate the law?

In a letter addressed in 1887 to the Colonial Secretary Chief Justice Higginbotham of Victoria (referred to by Professor Keith) remarked that the Instructions issued to the Governor of his State were a direct instigation to him to violate the law He added that "the radical vice of the Governor's Letters Patent, Commission and Instructions, both public and private, appears to me to be this that they studiously and persistently refuse to take note of the fundamental change made in the public laws of the Australian Colonies by the Constitution Acts of 1854-55 "‡ In so far as the duties, functions, and powers of the Governor were defined by statutes, the Instructions could not touch them, for in any case of conflict between the provisions of law and Instructions the latter were to be superseded to the extent of repugnancy Inasmuch as some of the Victorian Instructions were repugnant to the Constitution Acts they were to the extent of repugnancy null and void, and so far and perhaps no further Higginbotham, C J was perfectly right in challenging the validity of the Instructions But

* Keith *Responsible Government in the Dominions* Vol I p 209
† *Commonwealth Letters Patent* Clause I *Commission* Clause II
‡ E E Morris *Memoirs of George Higginbotham*, p 214

the weakness of his argument is revealed when it is remembered that during 1854-55, Governors were regarded as Imperial officers fully competent to carry out the Instructions save in so far as the Acts definitely suggested that in certain matters they were required to act on Ministerial advice according to the doctrine of Ministerial responsibility.

Certain principles laid down by the Colonial Office.

The controversy which arose in 1925 in connection with a New South Wales constitutional crisis is interesting. The following principles were laid down in the ruling of Mr. Amery, the then Colonial Secretary, as regards the constitutional status of the State :

1. The British Government did not regard a Governor, although appointed by the King on its recommendation, as being properly subject to any instructions from it as to the exercise of any power vested in him by law;
2. The British Government should not intervene in the internal affairs of New South Wales; and
3. The British Government considered that the particular dispute* had to be settled in New South Wales, and not in London.†

Mr. Amery's ruling, however, throws no light on the question as to whether the constitutional status of the State Governors or the Provincial Lieutenant-Governors was analogous to that of the Dominion Governor-General or on the question as to whether and to what extent a State Governor or a Provincial Lieutenant-Governor possessed the right to refuse to act on the advice of his responsible Ministers. Nor was any decision taken as regards Clause VI of the Instructions which authorised the Governor to act independently of his Ministers should occasions in his judgment warrant it and to which serious objection was taken by Mr. McTiernan, Attorney-General of Victoria, in view of the constitutional changes in that State. The resolution of 1926 reaffirmed

* The dispute arose out of the Governor's refusal to accept the advice of his Ministers and to make further appointments to the Upper House in addition to the twenty-five appointments already made.

† The ruling was given after the Byng episode in Canada but before the Imperial Conference Resolution of 1926.

in 1930 seems to have considerably altered the position,* although the Statute of Westminster, 1931, does not seek to give it legal form so far as the position of the Governor-General or the Provincial Lieutenant-Governor or the State Governor *vis-a-vis* his Ministers is concerned.

It may, however, be asserted that the Instructions to them from the United Kingdom as to the exercise of their reserve powers are at best anachronism after 1931, and there is visibly no attempt to uphold a contrary doctrine. In this matter as in many others the situation in India is different, for the statute gives the Governor-General and the Governors power in the clearest possible language to override their Ministers and in certain spheres even not to consult them. In those spheres where they are required to act "in their discretion" or "in the exercise of their individual judgment" their responsibility is ultimately to the Secretary of State, and hence the Instruments of Instructions are intended to play a large and important part in the development of the technique of Indian administration. They are not, however, intended to override the clear provisions of law.

Equal treatment only a myth.

It is no use at the present moment going into the past commercial policy followed in India by the Government. But there is little doubt that the British community have since the Industrial Revolution in England acquired skill, organising capacity and initiative in industrial leadership which are lacking in India. And if protection is required for purposes of indigenous development, it is required no less against British commerce than against foreigners. Equality or similarity of treatment accorded in British India to Indian subjects and European British subjects in such circumstances is an appeal to the doctrine of the survival of the fittest—the slogan of what Professor Laski would call the "Liberal State."

The liberty of contract has no meaning except in the context of equality of bargaining power. Equality is a myth save where a citizen has the wealth with which to purchase

* Professor Keith seems to hold that the resolution does not apply to State Governors or Provincial Lieutenant-Governors. See Chapter XVI, *supra*.

equality. The mere constitutional right to impose a customs tariff does not constitute fiscal autonomy of which it is only part. It includes the right on the part of the competent authorities to treat differently the industries owned and managed by "nationals" from those owned and managed by "non-nationals," to devise such measures as the reservation of coastal traffic or inland waterways to nationals and to exclude non-nationals from certain spheres of economic operation and to lay down terms and conditions in national interest as to the incorporation and registration of companies, composition of the Boards of Directors and employment of nationals in such enterprises.

It will be recalled that Sir William Clark, while speaking in 1916 as Commerce Member of the Viceroy's Executive Council, observed *apropos* of the resolution leading to the appointment of the Industrial Commission that "the building up of industries where the capital, control and management should be in the hands of Indians is the special object we all have in view." Further, he assured the Imperial Legislative Council, as it then was, that no measures would be taken which would "merely mean that the manufacturer who now competes with you from a distance would transfer his activities to India and compete with you within your boundaries."

The entry of Foreign Capital.

There is a vast wealth of material on the subject in the report of the Indian Fiscal Commission. On the question of the entry of foreign capital, members of that Commission agreed to differ in regard to certain particulars. The Majority pointed out the various advantages of foreign capital and favoured its entry into India without any restrictions whatsoever. They observed : "It is on the whole the foreign capitalist who imports into the country the technical knowledge and the organisation which are needed to give an impetus to industrial development. It is to him that we must look largely and first for the introduction of new industries and for instruction in the economics of mass production........... We hold, therefore, that from the economic point of view all the advantages which we anticipate from a policy of increased industrialisation would be accentuated by the free utilization of foreign capital and foreign resources," But they stated nevertheless that

a different policy should be followed " where Government grants anything in the nature of a monopoly or a concession, where public money is given to a company in the form of any kind of subsidy or bounty or where licence is granted to act as a public utility company "

Conditions to be imposed in case of subsidy

In such cases the Majority considered it reasonable that the Government should insist that the companies should be incorporated and registered in India with rupee capital, that there should be a reasonable proportion of Indian directors on the boards and that reasonable facilities should be offered for the training of Indian apprentices * In support of their recommendation they quoted from a speech of Sir (then Mr) Atul Chatterjee made on Sir Vithaldas Thackersay's resolution proposing that the money set apart for the rehabilitation of the railways should be spent in India Sir Atul said " The settled policy of the Government of India, as I think we have mentioned more than once in this Assembly, is that no concession should be given to any firms in regard to industries in India, unless such firms have rupee capital, unless such firms have a proportion, at any rate, of Indian directors and unless such firms afford facilities for Indian apprentices to be trained in their works This has been mentioned more than once and I can only repeat the declaration "

The Minority of the Fiscal Commission recommended extension of the principle

The policy formulated by the Government of India and reiterated by Sir Atul Chatterjee on behalf of the Government was intended for application under conditions of free trade As the Minority Report of the Fiscal Commission pointed out, the grant of direct concessions by the Government was a favour which justified the laying down of special conditions—a point of view which the Government had long accepted It may be mentioned in this connection that in response to an enquiry from the Secretary-General to the League of Nations the Secretary of State for India addressed a letter on the subject in which it was stated that the policy of the Government of India was "not to grant concessions such as bounties to industrial concerns unless the company, firm or persons pro-

* The Fiscal Commission Report, Chapter XV, p 169

vide facilities for training Indian apprentices and, in the case of a company, unless it has been formed and registered in India, and has rupee share capital and a reasonable proportion of Indian directors.''*

But the right to establish an industrial enterprise behind a tariff wall is in itself a concession, and "there is really no distinction between Government granting subsidies or bounties out of money collected by them by way of taxation and allowing an industry to tax the people directly by means of higher prices resulting from protective duties." In either case, the burden is to be borne by the people of India either as tax-payers or as consumers, and in either case again industrial concerns benefit either directly or indirectly. "If the imposition of conditions," observed the signatories to the note of dissent, "is justifiable in the one case, it is justifiable in the other."† They concluded, therefore, that the proposals recommended by the Majority of the Fiscal Commission in the case of direct subsidies or bounties and later accepted by the Government of India should be imposed upon every British or foreign company desiring to establish an industry behind a tariff wall.

Views of Sir Frederick Nicholson.

The Minority then proceeded to adduce reasons in support of their contention. Sir Frederick Nicholson was quoted as having stated his case thus: "I beg to record my strong opinion that in the matter of Indian industries, we are bound to consider Indian interests firstly, secondly and thirdly.........I mean by firstly, that the local products should be utilised, by secondly, that the industries should be introduced and by thirdly, that the profits of such industries should remain in the country." The Minority thought that the safeguards in regard to share capital and composition of the Board of Directors were necessary for the purpose of providing opportunities of investment of Indian capital and retaining the industrial profits within the country. They apprehended that if the Majority recommendations were accepted, it would be possible for companies incorporated in the United Kingdom and in non-Indian

* Letter No. E 80, 7954-28.
† The Fiscal Commission Report, Chapter V, Para. 41.

currencies to obtain their entire capital in their own countries and thus to carry away the profits of manufacturing industries established here behind a protective wall. Indian consumers will pay the price but non-Indians will reap the benefit. It is difficult to see how the economic development of the country can be effected under such conditions.

Incorporation and registration in rupee capital is insisted upon for another weighty reason. The companies floated here and registered in rupee capital will be subject under the provisions of the Indian Companies Act to some measure of control and supervision by the Government of India, and thus the interests of the consumers are likely to be safeguarded.

Government accept the Majority report.

The Government of India have not accepted the views expressed by the Minority but have laid down certain conditions in accordance with the recommendations of the Majority report to be satisfied by any company receiving direct aid from the Government or working under a licence. Under s. 5 of the Steel Industry Protection Act, 1924, for example, it is enacted that the companies concerned should be registered under the Indian Companies Act in rupee capital, that a reasonable proportion of the directors should be Indians and that facilities for the training of Indian apprentices should be provided. Again when the Indian Radio Telegraph Company obtained a licence, one of the terms of the agreement between the Government and the company was that sixty per cent. of the new capital should be reserved for Indians. Further, in the matter of subsidy to civil aviation the Government adopted the principle that the major part of share capital of the company receiving the grant should be reserved for Indians and that the majority of the directors also should be Indians.

India's Fiscal policy in Indian interests.

India is a growing country. There are possibilities of economic development on a vast scale. What she expects and demands is that her Governments and legislatures must have the unfettered right to adopt measures for the purposes of her industrial development. They must have, in other words, power, as the case may be, (1) to tax foreign or British im-

ports not only for revenue but also for protective purposes, (2) within the country itself to subsidise a purely indigenous industry and to impose conditions to be satisfied by any foreign or British company before it can start business here behind a tariff wall or earn a title to State help in the form of subsidy or bounty, and (3) to encourage Indian manufacturers by a liberal and, if necessary, generous purchase policy, *i.e.*, the various Departments of the Government at the Centre or in the Provinces should have the right, in regard to the purchase of their materials, to accept Indian tenders even at a higher price in preference to non-Indian tenders.

The Fiscal Autonomy Convention.

About twenty years ago Lord Selborne and his Committee suggested that it would be wrong to let India feel that her fiscal policy was dictated in British interests by Whitehall.* In accordance with that suggestion something like a Fiscal Autonomy Convention has been established in this country which stipulates that if the Government of India and the Central Legislature are in agreement with regard to certain fiscal policy, that should be the policy of the Government. It may be noted that a series of protective measures have been taken in accordance with this Convention since the Montagu-Chelmsford Constitution was put into operation. The Convention, however, has caused some misunderstanding in India. It has often been suggested that India's fiscal autonomy under the Convention is complete, that is to say, she is competent in law to exercise her free will in fiscal matters. It is not a correct statement of the position.

The Selborne Committee, for example, made it clear that power in this behalf could not be conferred upon

* "Nothing is more likely to endanger the good relations between India and Great Britain than a belief that India's fiscal policy is dictated from Whitehall in the interests of the trade of Great Britain. That such a belief exists at the moment there can be no doubt. That there ought to be no room for it in the future is equally clear............Whatever be the right fiscal policy for India, for the needs of her consumers as well as for her manufacturers, it is quite clear that she should have the same liberty to consider her interests as Great Britain, Australia, New Zealand, Canada and South Africa In the opinion of the Committee, therefore, the Secretary of State should as far as possible avoid interference on the subject when the Government of India and its legislature are in agreement......" (Para. 33 of the J.P.C. Report on the Government of India Bill, 1918).

the Government of India by statute "without limiting the ultimate power of Parliament to control the administration of India and without limiting the power of veto which vests in the Crown."* It could be assured, they said, only by acknowledgment of a Convention But the Convention again, in the opinion of the Committee, must not affect the international obligations of the Empire or any fiscal arrangements within the Empire to which the British Government were a party The Convention further presupposes agreement between the Government of India and the Indian legislature as a condition precedent to any effective action on a fiscal issue, and in the absence of that necessary agreement the will of the Governor-General and his Government shall by law prevail even against a clear and decisive verdict of the appropriate legislature All that was secured was that the Secretary of State as a general rule would not interfere with any action of the Government of India taken in agreement with the Indian legislature The limitations involved should be taken note of in fairness to His Majesty's Government in examining the provisions incorporated in the Government of India Act, 1935, read with the Instruments of Instructions

Conditions as to citizenship settlement, immigration, etc

There is no reason why India should begin her career of self-government with legal and constitutional limitations the like of which has never been thought of in the case of any self-governing Dominion The Governments and legislatures in India should not be fettered by any statutory undertaking guaranteeing to all classes of European British subjects the rights to which natural-born Indians are entitled Like the Dominions India should have the right to determine and regulate her own law of nationality subject generally, if at all necessary, to the provisions of the Imperial Act of 1914, and to lay down and enforce conditions of immigration and settlement If the conditions as to nationality and immigration, which might be laid down by the appropriate Indian authorities, are fulfilled by any British subject of non-Indian domicile or foreigner, he should be automatically admitted

* Para 33 of the Report

to all the rights and privileges of "Indian citizenship." In such a case he will have to undertake the corresponding obligations also.

Those who are not natural-born citizens of the country ought to give convincing proof of their abiding interest in the welfare of their land of adoption, and that proof can be given only when they satisfy certain tests in regard to residence, domicile or settlement. In this view of the case it is difficult to support the contention that British subjects domiciled and habitually resident in the United Kingdom and having had their business headquarters in London or elsewhere should be allowed to enjoy fully and freely the rights and privileges of "Indian citizenship."

This brings us to the problem of the employment of foreign capital for industrial purposes. The entry of foreign capital into this country may be a blessing in disguise, or it may be a necessary evil, or it may be an unmixed evil. Whatever it is, it is the appropriate Indian authorities which must have the final say in the matter,* and the provisions against descrimination in the new Act are bound to affect prejudicially India's interests in trade and industry. But when we have said all this we must also admit that some compromise, consistent with the country's industrial requirements, is necessary to conciliate sober British opinion and to safeguard the legitimate interests of the British commercial community. Such a compromise, however, does not seem to be feasible so far as the European British subjects, not already engaged in this country in lawful industrial pursuits, are concerned. Those European British subjects, who have lawfully and by legitimate means acquired rights here, ought to be given by agreement on a reciprocal basis a fair and square deal, regard being had to the principles of economic science and the best interests of the country's industrial development.

*In the course of a statement made in Bombay on their arrival on the 9th January, 1933, from London, Sir Tej Bahadur Sapru and Mr. Jayakar observed: "We strongly hold the view.........that whereas discrimination in commercial legislation on purely racial grounds is to be avoided, complete freedom ought to be left in the hands of the Federal and Provincial Governments of the future to initiate, support, maintain and subsidise industries (briefly described as the key industries and infant industries) and that the Governments should likewise have wide powers to check and control unfair competition."

The coasting trade of India may be cited as an instance. As stated in the resolutions of the Imperial Economic Conference of 1923, it was the established practice in the Empire to make no discrimination between ocean-going ships of the Commonwealth using the ports of its different parts, and as a matter of fact all British ocean-going ships were treated alike in all parts of the Commonwealth Such uniformity of treatment was regarded as an asset of considerable importance, at the same time a desire was expressed for local development

The coasting trade in the Empire

A solution of this complicated problem was attempted in the Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929 It was recognised that " under the new position, each part of the Commonwealth will have full power to deal with its own coasting trade " That general statement is, however, qualified by a rider that " the Governments of the several parts of the Commonwealth might agree, for a limited number of years, to continue the present position, under which ships of any part of the Commonwealth are free to engage in the coasting trade of any other part "*

To avoid conflicts of shipping laws in the Empire a formula was sought to be evolved by an agreement known as the British Commonwealth Merchant Shipping Agreement of December 10, 1931 † Part IV of the agreement is important so far as its effect on inter-Imperial relations is concerned It guarantees equal treatment in the Commonwealth to all ships registered in any of its parts It is laid down, for instance, that each part of the British Commonwealth agrees to grant access to its ports to all ships registered in the British Commonwealth on equal terms and undertakes that no laws or regulations relating to sea-going ships at any time in force in that part, shall apply more favourably to ships registered in that part, or to the ships of any

The Merchant Shipping Agreement of 1931

* Para 100 (b)

† *Parliamentary Debates* CCLX 289 Keith *Speeches and Documents on the British Dominions* pp 223 30

foreign country, than they apply to any ship registered in any other part of the Commonwealth.*

But this general principle does not apply to regulations as to the coasting trade, sea fisheries or the fishing industries; nor is it intended to prevent the levy of customs duties on ships built outside that part or the grant of financial assistance to ships registered in that part.† It may be mentioned that by an Act of 1929 the Dominion of Canada has taken power to restrict its fisheries to British ships registered in Canada and owned by Canadians, *i.e.*, British subjects of Canadian domicile, or bodies incorporated therein. The Canadian legislation as also the provisions of Art. 12 of the Agreement show that discrimination in regard to coastal shipping and sea-fisheries as between a British subject *qua* British subject is permitted on grounds of domicile or nationality.

A General Registry for British Shipping.

The next important point in the Agreement from the point of view of Imperial unity is the effort to secure that British shipping shall be entered on a general registry. It is provided that no part of the Commonwealth shall register a ship so as to give it the status of " British Ship " unless it is owned wholly by (1) persons recognised by law throughout the British Commonwealth of Nations as having the status of natural-born British subjects; (2) persons naturalised in pursuance of the law of some part of the British Commonwealth; (3) persons made denizens by letters of denization; or (4) bodies corporate established under and subject to the law of some part of the British Commonwealth and having their principal place of business within the British Commonwealth.‡ Vessels owned and registered in accordance with the provisions of this article enjoy a common status, and it has been proposed to maintain a Central Registry in London where particulars of all registered ships shall be kept and periodically communicated to each part of the Commonwealth. The laws, regulations, forms and procedure relating to such matters as registration, certificate of registry, measurement of ship and tonnage,

* Art. 10.
† Arts. 11 & 12.
‡ Art. 2.

trust and equitable rights, etc., shall be substantially the same throughout the Commonwealth and, so far as possible, be based on Part I of the Merchant Shipping Act, 1894.*

Each part of the Commonwealth shall determine the national flag to be borne by registered vessels and prohibit under penalty (a) the use by such vessels of any national colours other than those determined for those ships and (b) the hoisting on board any such ships without due warrant of colours proper to a man-of-war. The Agreement does not restrict the right of any Signatory Government to give preferential treatment to its own shipping as such except in those matters specified in the Agreement and referred to above but seeks to prohibit preferential treatment to foreign shipping to the prejudice of British shipping. It is doubtful if in actual practice this stipulation will operate, for those of the Dominions which are large exporters and are in need of markets throughout the world cannot afford to provoke retaliation by subjecting foreign shipping to restrictions which may not be imposed on British shipping according to law and in terms of the Agreement. They may be moved, on the other hand, to grant in certain cases to foreign shipping concessions which are withheld from British shipping registered outside their territory.

The Agreement imposes no legal obligations.

The Agreement, it should be borne in mind, imposes no legal obligations on the Signatory Governments. If the Legislature of any such Government refuses to accept the proposals embodied therein, the Government of that part cannot be held to have failed to implement the Agreement. Under the Statute of Westminster the Dominions are free to legislate regarding any and every ship which trades to their shores and so physically comes within their jurisdiction. As Professor Keith observes:† "Any principles adopted are now a matter resting on their wills alone, and this marks the most important extension of power under the Statute." It follows, therefore, that the Dominions are not *legally* bound to accord to British ships locally registered and those registered in some other part or parts of the

* Art. 8.

† Keith: *The Constitutional Law of the British Dominions*, p. 31.

Empire, equal treatment. The moral obligation involved in the Agreement, however, remains so far as the Signatory Governments are concerned.

Professor Keith maintains that indiscriminate action in exercise of the power conferred upon the Dominions by the Statute may prove fatal to the welfare of British shipping in whatever part of the Empire it may be registered. Canada, it is pointed out, has already suggested that any deviations from the existing law should be made after joint consultation with, and with the full approval of, the Commonwealth. Some sort of Imperial control is still unavoidable under the existing arrangements because the enforcement of the relevant Act is carried out by British Consuls and Naval Courts on whom Dominion legislation cannot impose duties. But it is implicit in the Statute of Westminster that the Dominions are entitled to alter the existing arrangements in so far as they affect them and thus oust the jurisdictions of British Consuls and Naval Courts.

The Agreement in relation to India.

The question as to whether India should accept the Agreement or not should, in our considered judgment, be left to be decided by the Government of the country responsible to the people or the Indian legislature, as the case may be, where public opinion is likely to be better represented than at present. The present practice of a bureaucratic Central Government, which is more or less under the control of Whitehall, of nominating delegations to consider International Agreements on India's behalf is justly looked upon with suspicion by considerable sections of public opinion. And any Agreement endorsed by such a delegation is likely to give rise to opposition which otherwise may not be offered. In the interests of India and of the Commonwealth alike the final decision in the matter should be deferred till after the new Constitution begins to function at the Centre. But it may be stated as a general principle and as a general principle only that if the Indian legislature decides to reserve the country's coasting trade to Indian ''nationals'' and ships owned and managed by the latter, it ought to give adequate notice to the existing interests and provide compensation to them, if any loss is involved. This general principle ought to hold good and to be strictly followed in

all other commercial and industrial concerns or undertakings or in regard to measures for the extinguishment or modification of rights in land.*

India's position, one of subordination

It is, however, extremely unfortunate that the principles underlying the Merchant Shipping Agreement should have been deliberately negated in the India Act of 1935.† As Professor Keith suggests, the Dominions have now practically the unfettered liberty to control their shipping laws even to the detriment of the interests of British shipping, although it does not mean that that power has been taken to injure British interests. The present India Act renders the Indian legislatures absolutely powerless in this respect. There is hardly any room for intervention in India in British shipping registered in the United Kingdom even if such intervention may be necessary for the purposes of national development except only when it is definitely proved that Indian ships are subjected to discriminatory treatment in the United Kingdom.

The reciprocity contemplated in the relevant section is meaningless from Indian standpoint, for it is inconceivable that Indian Shipping Companies, which cannot carry on business on Indian waters on account of unfair competition, would fare better in the United Kingdom than within the country. There can be no reciprocity between un-

* Legislation enacted by a competent legislature cannot be impugned on the ground that 'adequate' compensation has not been provided It may be urged that the question as to whether the provision for compensation is "adequate" or not is a matter for the legislature to decide and not for the court to inquire into (*Chicago Railway Co.* v *Chicago*, 166 U S 266) That point, however, does not necessarily arise in India in view of the enormous powers vested in the Governor General or the Governor acting in his discretion There is no provision for compensation in the present India Act (s 299) except when there is compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owing, any commercial or industrial undertaking In such a case the amount of the compensation for the property acquired must be fixed or the principles on which, and the manner in which the amount of compensation is to be determined, must be specified by the law. No Bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights or privileges in land revenue, shall be introduced or moved in any Chamber of the Legislatures without the previous sanction of the Governor General or the Governor, acting in his discretion, as the case may be

† s. 115

equals. What is demanded in India is that she should have in law power to develop her resources so that there may come a time when she will be in a position to reap to the fullest extent the fruits of a scheme of reciprocity. She wants power to promote her interests and not to injure British or other interests. Nor is there any reason to apprehend that the power, if secured, will be exercised in order mainly to subject British shipping to a kind of discriminatory treatment which is neither necessary nor fair. This and other provisions of the Act regarding discrimination will leave practically nothing of what is called fiscal autonomy and assign to India a position of undoubted subordination in the British Empire.

Restrictions on inter-Provincial trade prohibited.

While on the subject of discrimination it is necessary to call attention to the provisions of ss. 297 and 298 of the present India Act which deal respectively with the prohibition of certain restrictions on internal trade and guarantees against disability by reason only of race, religion, etc. The object of s. 297 is to treat the whole of British India as one economic unit and to forbid internal trade barriers. By paragraph (a) of sub-section (1) Provincial authorities, legislative or executive,* are debarred from taking advantage of the entry in List II of the Seventh Schedule such, for instance, as items 27 and 29, for the purpose of checking the free movement of goods or commodities within the country. It was, however, suggested in the course of Parliamentary debates† that the section left a Province free to deal with such questions as the adulteration of foodstuffs and other goods (item 30) and duties of excise on alcoholic liquors for human consumption and certain other goods manufactured or produced in the Province (item 40); but the imposition of an excise must not be construed as the grant of power to tax at a higher rate similar goods produced or manufactured elsewhere in India. A Province is competent to impose countervailing duties on such goods but only *at the same or lower rates*. A comparison may be made between

* Subject to the provisions of the Act the executive authority of each Province extends to the matters with respect to which the Legislature of the Province has power to make laws [s. 49 (2)].

† Vol. 300, Col. 1406.

these provisions and those of a similar character in the British North America Act,* and the Commonwealth of Australia Act † It will be seen that the disability in this respect does not extend to the Indian States, the reason being, first, that unlike the British Indian Provinces the States retain their internal sovereignty except in so far as they accede by Instruments to the Federation, and, secondly, that the entry in the Provincial List of the Seventh Schedule is not applicable to them

The protection extends to goods produced in foreign countries

The section extends not only to goods produced or manufactured within India but also to goods imported into the country from abroad It means that as soon as the goods have crossed the "customs frontiers" which is a Federal matter,‡ they are not to be subjected to any Provincial restraints of a discriminating character There can be no discrimination by legislation or administrative action in a Province between goods produced within the Province and similar goods imported from abroad or between imported British goods and imported foreign goods

The section has been interpreted as removing a loophole in Chapter III of Part V of the Act which, if it were left open, might have been used in a province for the purpose of discriminating against British trade and would thus have affected the operation to some extent of the Chapter in question The effect of paragraph (a) is direct while that of paragraph (b) is indirect The section is, therefore, designed to prevent discrimination of either type, and a tax, cess, toll or due will be invalid and beyond jurisdiction if in its effect it is discriminatory as between goods of different localities without directly affecting the purposes of paragraph (a) of the section Unlike in Australia§ the

* s 121 All Articles of the Growth Produce or Manufacture of any one of the Provinces shall from and after the Union be admitted free into each of the other Provinces

† s 92 On the imposition of uniform duties of customs trade commerce and intercourse among the States whether by means of internal carriage or ocean navigation shall be absolutely free

‡ Item 19 in List I of the Seventh Schedule

§ s 51 (ii) of the Commonwealth Act Read *The Annotated Constitution of the Australian Commonwealth* by Quick and Garran pp 549 556

Centre in British India is not specifically debarred from discriminating between the Provinces in the matter of taxation.

Penal action against British Indian subjects on certain grounds prohibited.

S. 298, which in part is a reproduction of the provisions of the Charter Act of 1833,* and of the Government of India Act of 1915,† is more or less a statutory declaration of some Fundamental Rights. Like the preceding section it has also a close affinity in form, phraseology and content to certain provisions of Chapter III of Part V. But its scope extends to the protection of the rights of His Majesty's subjects of *Indian domicile*‡ in regard to eligibility for office under the Crown in India or acquiring, holding or disposing of property, or carrying on any occupation, trade, business or profession in British India. No such subjects shall be debarred from these rights on grounds only of religion, place of birth, descent, colour or any of them.

It follows that no Province is competent either by legislation or administrative rules to create a "Provincial domicile" and make it the basis of reserving offices in the service of the Crown for "Provincials" in any Province or excluding His Majesty's subjects *domiciled* in India in regard to matters set out in the section and only on the grounds or any of them therein mentioned.§ It is not open to a Province, that is to create a sort of *local citizenship* by means of *domicile* rules and thus deprive His Majesty's subjects, domiciled in *India* but not admitted on some ground or other to such citizenship of the rights guaranteed to them by or under the section.‖ But differential treatment must be distinguished from a definite bar; and while the

* s. 87.

† s. 96.

‡ Note the difference in phraseology between s. 298 and the relevant sections in Chapter III of Part V. The scope of s. 298 is wider so that exclusion is not permitted against His Majesty's subjects domiciled in any part of India, whether British or non-British. Chapter III of Part V, on the other hand, restricts immunities or privileges only to His Majesty's subject's domiciled in British India so that the United Kingdom may discriminate against His Majesty's subjects domiciled, say, in an Indian State without any breach of the reciprocity clauses of the Chapter.

§ Read the Congress Working Committee's resolution on the Bengali-Behari dispute adopted in January, 1939.

‖ This view was expressed for the first time by the author in a series of articles in *Hindusthan Standard* (Calcutta) and later on endorsed by such a distinguished Indian jurist as Mr. P. R. Das.

section prohibits the latter, it does not seem to hit the former Nor is it within its rights to frustrate the purpose of the section by seeking to stop, regulate or control the entry into its jurisdiction of His Majesty's subjects, for migration within India from or into a Governor's Province or a Chief Commissioner's Province is a Federal subject* and not the concern of the Provinces

In a Federation there may be classification of citizens with reference both to the centre and its constituent units as in U S A † and also partially in Australia,‡ but the present India Act appears to prohibit it except in respect of "residential" qualifications for franchise and membership of the legislatures § It has been held in a series of U S A judicial decisions that s 2 of Art IV like s 1 of the Fourteenth Amendment, seeks to place the citizens of each State on a footing of equality with citizens of other States and prohibit discriminatory treatment against the citizens of one State by another State ‖ The "privilege and immunity" clause is not, however, to be construed as controlling the power of the States over the rights of their citizens What it does is to provide that whatever the rights accorded by a State to its citizens and whatever the restrictions imposed on their exercise, "the same, neither more nor less, shall be the measure of the rights of citizens of other States within its jurisdiction "¶ But in *McCready* v *Virginia*** it was held that "a State may grant to its own citizens the exclusive privilege of using the lands covered by water on its borders for the purpose of maintaining oyster-beds, and may with penalties prohibit such use by citizens of other States " A right of fishery, it was maintained, was a proprietary right, and not a mere privilege or immunity of citizenship, it was not hit by the "privilege and immunity" clause or by the Fourteenth Amendment Doubt has been expressed, quite properly, as to the applicability of this

* Item 50 in List I of the Seventh Schedule

† s 2 of Art IV and s 1 of the Fourteenth Amendment of the U S A Constitution

‡ Kerr *The Law of the Australian Constitution* p 68, s 117 of the Commonwealth Act

§ First Fifth and Sixth Schedules to the Act

‖ *United States* v *Harris*, 106 U S 629

¶ *Slaughter House Cases* 16 Wall 36

** 94 U S 391.

doctrine under s. 117 of the Commonwealth Act.* It appears to us to be clear also that the U. S. A. doctrine referred to above cannot be relied upon in interpreting s. 298 of the India Act of 1935.

But that section is apparently no safeguard against penal action to which "corporations" may be subjected by a Province,† for a "corporation" is not a "citizen," or "His Majesty's subject" within the meaning of the section. It does not seem to debar a Province from discriminating, subject to the other provisions of the Act, between its own "corporations"‡ and those constituted by or under the laws of another Province or of the Federation.§ A point of construction will, however, arise in actual operation of any penal action against a Provincial "corporation" that another Province may deem fit to take. A Provincial "corporation" must have its "objects" confined within its borders so that discrimination against it is not a practical proposition unless discrimination against its "goods" is held to be discrimination against the "corporation" itself. But the provisions of s. 297 prohibit discriminatory treatment by one Province to the prejudice of "goods" from another, and here again the applicability of the doctrine asserted in the United States decisions to India is seriously in doubt.

Savings.

Paragraphs (a) and (b) of sub-section (2) of s. 298 are, however, savings for such Acts as the Punjab Land Alienation Act and a similar measure in the Bundelkund area in the United Provinces and certain personal laws or customs which may be held to attach to the members of a community some right, privilege or disability in respect of matters enumerated in sub-section (1) of the section. What is contemplated in paragraph (b) is a certain customary law in the Punjab as to pre-emption which gives the residents of a village the right to be the first buyers of the land, if it is to be sold.||

* Quick and Garran : *The Annotated Constitution of the Australian Commonwealth*, p. 961.

† Read the decisions in *Paul* v. *Virginia*, 8 Wall. 168 and *Ducat* v. *Chicago*, 10 Wall. 410.

‡ See Item No. 33 in List II of the Seventh Schedule.

§ See Item No. 33 in List I of the Seventh Schedule.

|| *Parliamentary Debates*, April, 1935.

The principle of discrimination against aliens recognised

Much has been said and written regarding differential treatment accorded to aliens by different countries of the world. Laws and practices have been quoted in support from the economic history of the United States, France, Germany, Italy, Denmark, Roumania, Greece and Mexico, showing that the Government of each of those countries have reserved for their own citizens certain rights and privileges which for one reason or another are not extended to aliens.* The Merchant Shipping Agreement has already been cited as definite proof that the British

*U S A The coasting trade is reserved for the National Flag It is absolutely reserved The right to the coasting trade is not in any case extended to other flags

France The national coasting trade is reserved for the French Flag by Art 4 of the Decree of September 21, 1793

Germany The right to load goods in a German seaport and transport them to another German seaport with a view to unloading them in the latter (coastal goods trade) is exclusively reserved to German ships Brazil, Denmark, Norway and the Netherlands are at present authorised by decree to engage in Germany's coasting trade

Italy The exercise of the coasting trade along the shores of Italy and the maritime service of the ports, roadsteads and beaches of the country are reserved for the National Flag except as otherwise laid down in special treaties or conventions The reservation of the coasting trade for the National Flag is not, therefore, absolute

Denmark Under the provisions contained in the ordinances of September 1, 1819 and September 5, 1820, the transport of goods between Danish ports by vessels the tonnage of which does not exceed 15 *Commercelaester* (a tonnage corresponding to 30 net register tons) is reserved for vessels owned by Danish subjects Under the law of April 14, 1865, the Danish Government was authorised on condition of reciprocity to grant the right to engage in the coasting trade to vessels, whatever be their tonnage whose home port is situated in a country entitled to preferential treatment in its commercial relations wtih Denmark, provided that the foreign vessels in question comply with the general regulations in force with regard to the exercise of the coasting trade in Denmark

Roumania The maritime coasting trade is reserved for the National Flag Nevertheless, special authorisations may be granted in certain clearly defined cases This reservation is not established by law, but by usage, and it is expressly stipulated in commercial treaties concluded by Roumania

Greece Under the Royal Decree of 1863, concerning commercial navigation, which has force of law, except in cases where, on condition of reciprocity, conventions signed by Greece provide otherwise, vessels bying the National Flag have the exclusive rights to carry native products from one port of the country to another Furthermore, under the clause of Article 9 of the Statute on the international regime of maritime ports (Geneva, December 9, 1923), authorising her to do so, Greece has reserved the coasting trade for the National

Empire does not permit a foreigner to be a proprietor in part or in whole of a British ship and reserves certain rights in regard to British ships for natural-born and naturalised British subjects only or for corporations which are subject to the laws of some part of the Commonwealth.*

But such an analogy, though quite useful, raises a somewhat different issue; for European British subjects, whichever part of the Commonwealth they may come from, are not yet regarded as non-nationals in the sense that the Germans or the Frenchmen are non-nationals in this country. The former are British subjects in all parts of the Empire and as such carry with them, wherever they go, a common status, though not everywhere equal rights and privileges. The interpretation, therefore, sought to be put on the existing law of " citizenship " in India by Sir Hari Singh Gour† does not seem to be accurate. Reference to the British Nationality and Status of Aliens Act, 1914, and the Indian Act (No. VII) of 1926, will make the position clear. In fact and in law members of the British community are at present citizens of this country and are not required to take out " naturalisation " papers.

Flag in the Treaties of commerce and navigation which she has concluded in recent years.

Mexico: According to Article 99 of the Customs law, Mexican vessels only have the right to engage in the coasting trade except in cases in which, in the interest of the public welfare, the communications department grants special permit to a foreign vessel to engage in such trade. The coasting trade, therefore, is not absolutely reserved for the National Flag.

(The League of Nations: Official Number: C 195 M. 78, VIII. *Addendum* submitted to the League Council and circulated among the members of the League.)

* ss. 437 and 438 of the Merchant Shipping Act, 1894, as amended by s. 441 of the Merchant Shipping Act, 1894, and s. 7 of the Merchant Shipping Act, 1906, contain special provisions regarding the marking of deck and load lines, in the case of ships engaged in the coasting trade. The Merchant Shipping Act of 1894, as amended by the Merchant Shipping Act, 1906, prescribes that foreign steamships carrying passengers between places in the United Kingdom must comply with certain requirements. Ss. 324-327 of the Customs Consolidation Act, 1853, give certain powers to restrict the privileges of foreign ships and to impose additional duties on those ships or on goods carried in them where the countries concerned discriminate against British ships. By the Indian Coasting Trade Act of 1850 (Act V) Indian coasting trade was, however thrown open to all comers.

† See p. 562 *supra*.

In dealing with them India cannot be presumed to be dealing with aliens as is contemplated in the laws and customs of certain countries which are mentioned above.

The British Empire is internationally a unit by itself under the Crown; and we have, therefore, for the purposes of illustration, to seek for instances of differential treatment between different classes of British subjects within the Empire. And we have shown by reference to laws and practices prevalent in the Empire that discrimination as between different classes of British subjects in trade and commerce and also in political rights not only exists within the Empire but has been definitely protected by law.

European British Subjects in Criminal Law

The nature of privileges enjoyed by Europeans etc.

European British subjects* as well as to a lesser degree other Europeans and Americans† had originally occupied a privileged position in India in criminal law *vis-a-vis* Indian British subjects. The law was considerably altered in 1923 and as a result the privileges enjoyed by Europeans and Americans have been extended to Indian British subjects. But yet the status of equality between European British subjects or other Europeans or Americans on the one hand and Indian British subjects on the other hand has not been reached. Before 1923, the former enjoyed privileges is respect of (1) the judges and magistrates competent to try Europeans or Americans, (2) the sentences which such judges and magistrates were entitled to pass, (3) the right of trial by mixed jury and with mixed assessors and (4) appeal. The pro-

* "European British subject," for the purposes of criminal proceedings, means (i) any subject of His Majesty of European descent in the male line born, naturalised or domiciled in the British Islands or any Colony, or (ii) any subject of His Majesty who is the child or grand-child of any such person by legitimate descent [s. 4 (I) (i) of the Criminal Procedure Code] This definition is not affected by the meanings assigned in the First, Fifth and Sixth Schedules to the Government of India Act, 1935, to such expressions as "Europeans" and 'Anglo Indians" Some "Anglo-Indians" in terms of the present Government of India Act may, therefore, be treated as "European British subjects" under the Code of Criminal Procedure.

† Compare the provisions of sub section (1) of s 275 the Criminal Procedure Code with those of sub section (2).

visions, as Woodroffe points out,* were intended to secure that with certain exceptions judges and magistrates should be themselves European British subjects and that the jury and assessors should be constituted with a stated number of European British subjects, Europeans or Americans; to limit the nature and terms of sentences which might be pronounced by courts other than the High Courts: and to secure for Europeans British subjects an extended right of appeal. The old law on the subject was stated in ss. 408,† 416,‡ 443,§ 444, 445, 446, 447, 449, 450 and 451 of the Criminal Procedure Code.

Discrimination in criminal law substantially removed in 1923.

It is not required under the amended law that the judge or magistrate should be in any case a European British subject. All Indian judges or magistrates, who are otherwise competent, are entitled to enquire into any offences committed by European British subjects or other Europeans or Americans. But there are still certain restrictions with regard to sentences of punishment which may be passed in any particular case. A court of session, for example, can pronounce any sentence on a European British subject except a sentence of whipping which may be awarded to an Indian British subject.‖ Similarly a district magistrate or a magistrate of the first class may pass on European British subjects a sentence of imprisonment for two years or a fine up to rupees one thousand or both¶ but not whipping. The relevant section of the Code, *i.e.*, s. 34A, does not make mention of the sentence of whipping; and it is, therefore, interpreted as having abolished that form of punishment for the European British subjects, notwithstanding anything contained in ss. 31, 32 and 34. Then again no magistrate of the second or third class can enquire into

* Woodroffe : *The Criminal Procedure Code in British India.*

† Proviso (a).

‡ Nothing in ss. 413 and 414 applied to appeals from sentences passed under Chapter XXXIII on European British subjects.

§ The sections from 443 to 451 generally deal with the procedure that was followed in criminal proceedings against Europeans and Americans. Drastic amendments have been made in Chapter XXXIII; it is in fact a new Chapter. It applies only where racial considerations are involved and not otherwise. Read Para. II of the Statement of Objects and Reasons appended thereto. The old sections 450-451 have been repealed.

‖ s. 34A (a).

¶ s. 34A (b).

or try an offence punishable otherwise than with a fine not exceeding rupees fifty, if the accused person is a European British subject and claims to be tried as such.*

The position, therefore, is that "inequality.........still exists as regards sessions and first class magistrates' courts and as regards the latter courts......an Indian British subject may still incur a heavier sentence in the case of a magistrate specially empowered under sections 30, 34. Second or third class magistrates have in cases, where the accused person is a European British subject and claims to be tried as such, only the very limited jurisdiction to punish with fine not exceeding rupees fifty."† In other matters the position of His Majesty's Indian subjects seems to have been approximated to that of his European British subjects or other Europeans or Americans.

Provisions of the amended Code.

In a trial by jury before the High Court or a court of session of a person who has been found under the provisions of the Code to be a European or an Indian British subject a majority of the jury shall, if such person before the first juror is called and accepted so requires, consist, in the case of a European British subject, of persons who are Europeans or Americans and, in the case of an Indian British subject, of Indians.‡ Like provisions are made for Europeans other than European British subjects and Americans in whose case also, if the accused persons so require, the majority of jurors, *if practicable*, are to be Europeans or Americans.§ The majority of jurors contemplated in this section need not necessarily be British subjects. It should be clearly understood that an Indian Christian is not entitled under the section to claim a Christian jury|| and that religious grounds cannot be urged in challenging a jury.

In a trial with the aid of assessors, the entire body of assessors shall be Europeans or Americans or Indians according as the accused person is a European British subject or an Indian British

* s 29A

† Woodroffe · *The Criminal Procedure Code in British India*, Part VIII, Chap. XXXIII.

‡ s. 275 (1).

§ s. 275 (2).

|| 1 W. R. 2.

subject, provided that he so requires.* If in such a trial the accused person is a European other than a European British subject or an American, the assessors shall all, *if practicable* and if he so requires, be Europeans or Americans.†

Provision is made in s. 285A to the effect that in cases in which Indians and Europeans or Americans are sought to be tried jointly under s. 275 (with a jury) or under s. 284A (with the aid of assessors), they may claim to be tried separately before jurors or assessors, as the case may be, who are drawn from the same racial stock as the accused. In cases in which the provisions of Chapter XXXIII do not apply, a person may claim to be tried or dealt with as a European (British or otherwise), or an American or an Indian British subject,‡ but his claim must be substantiated by evidence.§ A mere statement by the accused without sufficient evidence is not adequate for the purpose.||

If in any case Europeans (British or otherwise), Americans or Indian British subjects do not claim to be dealt with as such by the magistrate before whom they are tried or by whom they are committed or if, when such claim has been made before and rejected by the committing magistrate, it is not repeated before the court to which such persons are committed, they are to be held to have relinquished their right to be dealt with accordingly, and cannot assert it in any subsequent stage of the case.¶ The waiver is not irrevocable provided the withdrawal of the waiver is made promptly.** Again if persons are tried or dealt with as belonging to a class in terms of the Code to whch they do not belong and if the persons concerned do not object, the enquiry, commitment, trial, or sentence, as the case may be, shall not, by reason of such dealing or trial, be invalid.††

As the law at present stands, the trial by jury before a magistrate is abrogated and in its place a new procedure applicable to

* s. 284A (1).
† s. 284A (2).
‡ s. 528-A.
§ 6 M. H. C. R. 7.
|| 5 W. R. 53.
¶ 1912 P.R. 6; and 37 Cal. 467.
** 1908 P.R. 1.
†† s. 528-C.

both European British subjects and Indian British subjects has been introduced, viz, trial by a mixed Bench in a summons case where a magistrate or a sessions judge decides under s 443 that the case ought to be tried under the provisions of Chapter XXXIII * Where the case is a warrant case, the magistrate enquiring into or trying the case shall, if he does not discharge the accused, commit the case for trial to the court of session, whether the case is or is not exclusively triable by that court † The court shall then proceed to try the case as if the accused had required to be tried under the provisions of s 275 and the provisions of that section and the other provisions of the chapter in question, so far as they are applicable, shall apply But where the trial before the court of session would ordinarily be with the aid of assessors and the accused, or all of them jointly, require to be tried under the provisions of s 284A, the trial shall be held with the aid of assessors all of whom shall, in the case of European British subjects, be Europeans or Americans or, in the case of Indian British subjects, be Indians The magistrate is bound to inform the accused person of his rights under this special Chapter if at any stage of an enquiry or trial under the Code it appears to him that the case is or might be a fit case for trial in accordance with the provisions of this Chapter ‡ The provisions of ss 445, 446, 447 and 449§ apply both to European British subjects and Indian British subjects

The privileged position of Europeans etc indefensible

It is difficult to defend the privileged position, however slight, of the European community or Americans in respect of the jurisdiction of certain courts and the form of punishment to which we have referred, notwithstanding the salutary changes brought about by amendment of the old law It is also to be regretted that the lawmakers, when they amended the Code in 1923, should have per-

* s 445

† s 446

‡ s 447

§ Clause 25 of the Letters Patent which provides that there shall be no appeal to any High Court from any sentence or order passed or made in any criminal trial before that Court in the exercise of its Original Criminal Jurisdiction has been modified by s 499 of the Code of Criminal Procedure

suaded themselves to classify the citizens into two different classes based on race, namely, European British subjects and Indian British subjects. The right to trial by jury is a priceless gift of democracy for which we are indebted to the British legal system; but it does not seem to be a sound doctrine to give an accused person, whether Indian or European, an opportunity to push racial claims in the Temple of Justice where there should be no difference of race, caste, creed or colour. European British subjects should, in our opinion, depend on the good sense and impartiality of their fellow Indian subjects and *vice versa*, and thereby alone can the ends of justice be adequately and effectively met.

Apart from these defects of the present law which tends to perpetuate privilege and inequality based on race, there was s. 65 (3) of the Government of India Act which laid down that the Indian Legislature had no power, without the previous approval of the Secretary of State in Council, to make any law empowering any court other than a High Court, to sentence to the punishment of death, any of His Majesty's subjects born in Europe or the children of such subjects. That again constituted preferential treatment accorded mainly to European British subjects as against their fellow Indian subjects, a provision which ought not to have been made, if only to inspire confidence in justice and in the machinery of justice. It also constituted a serious diminution of the powers of the Indian Legislature.

Again the rule had been in existence since 1781—it was re-enacted in s. 111 of the Government of India Act—that an order in writing of the Governor-General in Council constituted a full justification for any act, in any proceeding, civil or criminal, in any High Court, acting in the exercise of its original jurisdiction, except so far as any European British subject was concerned. The jurisdiction of the High Court was ousted by this procedure in respect of any official act which prejudicially affected an Indian British subject as distinguished from a European British subject in whose case the competent High Court had power to adjudicate. That was discrimination in favour of European British subjects. It is difficult to understand why the judicial protection in British India accorded to them was denied to His Majesty's Indian

subjects.* The Act of 1935 has, however, abolished this preferential treatment for European British subjects, and an order in writing mentioned in s. 111 of the repealed Act will no longer be held to be a valid justification for any executive act in connection with the proceedings of a High Court in India.

Privileges in criminal law protected under the India Act of 1935.

The existing rights of European British subjects in criminal proceedings are sought to be protected under clause (d) of sub-section (2) of s. 108 of the 1935 Act. It is laid down that unless the Governor-General in his discretion thinks fit to give his previous sanction there shall not be introduced into, or moved in, a Chamber of a Provincial Legislature any Bill or amendment which affects the procedure for criminal proceedings in which European British subjects are involved. It may be urged that as no mention is made in the section of the Federal Legislature or any Chamber thereof the saving is not complete, for legislation affecting those rights may be undertaken at the Centre having regard to items (1) and (2) of Part I of List III of the Seventh Schedule which have placed criminal law and criminal procedure in the concurrent sphere of legislation. To that the answer is perhaps to be found in sub-section (3) of the section read with clause (c) of sub-section (1) of s. 12 of the Act. The protection is, therefore, effective unless the Governor-General allows his discretion or individual judgment, as the case may be, to be influenced by his Ministers or the Legislature and is himself determined or at least anxious to curtail or take away the rights which His Majesty's European British subjects enjoy at present.†

In ecclesiastical affairs also His Majesty's Christian subjects including the European community have been given certain privileges at State expense which have been denied to Hindus,

* Nothing in the section abrogated the right of His Majesty's subjects, Indian or British, to seek relief against the Governor General, any member of his Executive Council or any person acting under his orders, in a competent Court in England

† Professor Keith observes that "since legislation of 1923, unfair discrimination in favour of Europeans in regard to criminal trials has been abolished" That is a view which is not strictly correct as has been shown in the criticism of the amended legislation of 1923 Some inequality still exists. (Keith ; *The Governments of the British Empire*, p 599)

Musalmans or other religious sects or tribes. The preferential treatment accorded to European British subjects in criminal trials as Europeans and in ecclesiastical affairs as Christians does not on principle seem to be consistent with the equality of treatment with His Majesty's Indian subjects which has been guaranteed to British subjects of United Kingdom domicile in Chapter III of Part V of the Act. The whole position is anomalous.

CHAPTER XVIII

The Federation and Residuary Powers

In connection with the protection of minorities it has been asked, (1) whether the future Constitution of India should be of a federal type, and (2) if so, whether the residuary powers should vest in the Federal Centre or in the constituent units The Hindu Mahasabha and one of their official spokesmen, Dr M S Moonje, seemed to think that these questions were purely constitutional and as such had nothing to do with the protection of minorities Of course, the questions are mainly of a constitutional nature, but that does not mean that they have no bearing at all on the problem of the protection of minorities In certain States of Europe and in some British Dominions the Federal system has been recognised as a means of protecting the rights of minorities There are so many historical precedents in this regard that there seems to be no need for labouring the point European or Dominion analogy may not hold good in the case of India in all its details, but the broad principle that devolution of power or division of authority on Federal principle provides opportunities of regional development and gives scope to minorities for self determination within the limits set by the Constitution cannot be seriously contested The questions, therefore, which have been raised in India cannot be lightly dismissed as having no connection with the problem of protection as such

Connection between Federation and Protection

So far as the first question is concerned, opinions so far expressed are practically unanimous that India should be constituted on a federal basis At the first session of the Round Table Conference Sir Tej Bahadur Sapru said

Opinion unanimous as regards Federation

> I am a strong believer in the federal form of government I believe therein lies the solution of the difficulty and the

salvation of India. I would welcome the association of the Indian States in British India mainly for three reasons. I say that they will furnish a stabilising factor in our constitution. I further say that the process of unification will begin at once. I lastly say that in regard to matters of defence they will furnish a practical experience which is yet wanting in India."

On behalf of the Princes His Highness the Maharajah of Bikanir made a warm response to Sir Tej's appeal and stated :

"We of the Indian States are willing to take our part in and make our contribution to the greater prosperity and contentment of India as a whole. I am convinced that we can best make that contribution through a Federal system of Government composed of the States and British India."

While closing the plenary session of the first Round Table Conference Mr. Ramsay Macdonald pointed out that "His Majesty's Government has taken note of the fact that the deliberations of the Conference have proceeded on the basis, accepted by all parties, that the Central Government should be a Federation of all India—embracing both the Indian States and British India in a bicameral Legislature." The Prime Minister made another statement on the 1st of December, 1931, at the close of the second session of the Conference, reaffirming His Majesty's Government's belief "in an all-India Federation as offering the only hopeful solution of India's constitutional problem." "They intend," he added, "to pursue this plan unswervingly and to do their utmost to surmount the difficulties which now stand in the way of its realisation." It is therefore regarded by some Indian politicians as improper, if not extremely difficult, to go back upon the general plan of a Federal Constitution* agreed upon at the Conference, for the proposals therein adumbrated were made subject to the proviso that the Constitution should be of a federal type. We say "the general plan" because the detailed constitutional provisions in this regard, especially with reference to representa-

* The Gandhi-Irwin Agreement accepted federation as an essential part of the future Constitution (cl. 2 of the Agreement).

tion of the Indian States* in the legislature, the nature of their proposed accession to the Federation and the type of their internal administration are bound to affect the projected Federal structure and weaken the British Indian Provinces in relation to the States.

Residual power leads to controversy

But as regards the vesting of residuary powers, there are and have been acute differences of opinion. The Simon Commission having made it clear that the ultimate aim of India should be a Federal system suggested that in such a federation "the residue of powers, outside the specific federal list, would be with the States and the Provinces."† They said further "that whereas in British India there is a long tradition of an overriding Central authority with wide powers over a Provincial Government, not limited to the prevention of misrule and extending to many matters which affect that particular Government alone, it would be natural under a federal constitution to delimit strictly the scope of Central control."‡ But they did not offer any precise formula and counselled caution. It cannot be doubted, however, that Sir John Simon and his colleagues were in favour generally of the American or the Australian model

The Sankey Sub-Committee appointed by the Round Table Conference were not able to come to a final decision with regard to this matter. But they pointed out that however careful the subjects were listed as Federal, Central and Provincial, there is bound to be a residue of subjects not included in any one of them. They expressed the view that "whether these residuary powers of legislation are to rest with the Federal Government or with the Provinces is a matter which will need the most careful consideration at a later stage."§

* Professor Keith draws analogy between the position of the natives in Basutoland, Bechuanaland and Swaziland and the claim of the rulers of the Indian States that they cannot be made subject, without their consent, to the control of a responsible Government in India, in lieu of that of the King exercised through the Viceroy, responsible to the Secretary of State for India and to the Imperial Parliament (Keith *Sovereignty of the British Dominions*, pp 71 72)

† The Simon Commission Report, Vol II p 199

‡ *Ibid.*, p 197

§ The Sankey Sub Committee's Report, p 38

Moslems demand it for Provinces.

It is well-known that the Muslims of all sections of political opinion urged that the residuary powers should be vested in the constituent units of the Federation. That view was taken in Mr. Jinnah's Fourteen Points. It was adopted in a comprehensive resolution passed by the All-India Muslim Conference held at Delhi in the month of January, 1929, and was reaffirmed by the All-Bengal Muslim Conference held at Faridpur in Bengal under the presidency of Dr. M. A. Ansari. The Congress formula, which was adopted by the All-India Congress Working Committee and circularised by Mahatma Gandhi among members of the Round Table Conference in London, contains the provision that "the residuary powers shall vest in the federating units unless, on further examination, it is found to be against the best interests of India."* In his memorandum on the Congress formula Dr. Moonje, however, emphasised that "it shall be in the best interests of the country as a whole that they (residuary powers) should be vested in the Central Government rather than in the federating units." "A strong Central Government," he added, "is the only sure protective agent of the constitutional rights and liberties of the federating units." Dr. Moonje's view substantially represents the view taken by the Hindu Mahasabha on the subject. The Sikhs also support it as will appear from their scheme presented to Lord Willingdon, when they led a deputation on him in July, 1931.

Federation reconciles national unity with State rights.

The distribution of powers between the Federal Centre and its constituent units has been a vexed question ever since federation came within the range of practical politics. Some idea of the basis on which powers are generally distributed is to be found in the various definitions which the expression has received from time to time. There is that classical definition of Professor Dicey, according to whom, "a federal State is a political contrivance intended to reconcile national unity and power with the maintenance of State rights."† A Federation

* The Congress Scheme, cl. 8.

† Dicey : *op. cit.*, p. 139.

aims at a Constitution under which generally the ordinary powers of sovereignty are divided between the national Government and the constituent States The nature of division of these powers varies under different Constitutions But the fundamental principle which is universally recognised is that matters concerning the nation as a whole should be placed under the control of the Centre and that those which are not of that character should remain in the hands of the States "A truly federal government," observes Professor Dicey, "is the denial of national independence to every State of the federation "*

Sir Robert Garran defines the federal system as "a form of government in which sovereignty or political power is divided between the central and the local government, so that each of them within its own sphere is independent of the other '† Freeman says that "a federal Commonwealth in its perfect form is one which forms a single State in its relation to other States, but which consists of many States with regard to its internal government "‡ Discussing the position of the American Federal Republic Lord Bryce expressed his view in the following words " It is itself a Commonwealth as well as a union of Commonwealths, because it claims directly the obedience of every citizen, and acts immediately upon him through its courts and executive officers Still less are its minor communities, the States, mere sub-divisions of the Union, mere creatures of the national government, like the counties of England or the departments of France They, that is, the older ones among them existed before it They could exist without it "§ Sir John Marriott is of opinion that "Federalism must be regarded as a half-way house between entire independence and a compact and completely homogeneous national unity "‖ Another writer¶ observes that "federalism is the coming together of a number of States, formerly separated and sovereign, into some kind of ar-

* Dicey *The Law of the Constitution* Introduction lxix

† Report of the Royal Commission on Finances of Western Australia

‡ *History of Federal Government in Greece*

§ Bryce *The American Commonwealth* Vol I p 16

‖ Marriott *The Mechanism of the Modern State* Vol II p 387

¶ Pacificus *Federalism and Home Rule*

rangement to secure the common safety and prosperity. These various independent or quasi-independent Governments agree to give up to the federal Government a greater or less proportion of their independence............It is a movement from disunion towards union, a change from centrifugal principles of political action to the centripetal.''

Lord Haldane's doctrine.

The view expressed by Lord Haldane in the judgment delivered by him in *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Company Limited** is rather significant. In that judgment it was held that " in a loose sense the word ' federal ' may be used.........to describe any arrangement under which self-contained States agree to delegate their powers to a common Government with a view to entirely new Constitutions even of the States themselves. But the natural and literal interpretation of the word confines its application to cases in which these States, while agreeing on a measure of delegation, yet in the main continue to preserve their original Constitutions. ......Of the Canadian Constitution the true view appears, therefore, to be that, although it was founded on the Quebec resolutions and so must be accepted as a treaty of union among the then Provinces, yet when once enacted by the Imperial Parliament it constituted a fresh departure, and established new Dominion and Provincial Governments with defined powers and duties both derived from the Act of the Imperial Parliament which was their legal source.'' Lord Haldane, therefore, rejected the common theory that the Canadian Constitution was based on a Federal pattern and held that it could not be described as federal except in a loose sense.

A narrow definition.

With respect to his lordship and the Judicial Committee of the Privy Council, on whose behalf he delivered the judgment in the celebrated case quoted above, it is submitted that there are two different types of federal government, each equally orthodox, although one of them may be centripetal in its bias and the other centrifugal. In this view of the

* (1914) A.C. 237.

case a federal government is not reduced to a unitary pattern if the delegated or defined powers are given to the States and the residuary powers are vested in the National Centre Although it is a general principle that the residuary powers are enjoyed by the originating authorities as in the case of the Australian States or the States of America, that principle may be departed from in the evolution of Federal Constitutions without prejudice to the Federal principle A statutory division of powers between the Centre and its constituent units which neither the Centre nor the units by themselves can alter and which is subject to the interpretation of Courts is of the essence of Federalism, and from that point of view, the Constitution of Canada is certainly federal *

I The Dominion of Canada

Now, there are different methods followed in different countries in regard to the distribution of powers

The Canadian type

In the Dominion of Canada there are two sets of powers—one set for the Dominion Parliament in respect of subjects provided for in s 91 of the British North America Act and the other set for the Provincial authorities regarding subjects specified in s 92 of the Act S 91 gives the Dominion power also " to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces " The two sections taken together appear to imply that the Provinces enjoy, apart from the control of specific subjects, some measure of general residuary power over matters, not clearly defined, of merely local import while the general residuum belongs to the Dominion It was further contemplated that the Federal Centre would not under its general power interfere with matters exclusively assigned to the Provinces

One of the leading principles on which the division is presumably based is that the enumerated powers of the

* *Liquidators of the Maritime Bank v Receiver General of New Brunswick* (1892) A C 437

Dominion and of the Provinces are as a general rule mutually exclusive.* In law and in fact, however, the powers as set out in the two sections are not exclusive. Several sections of the Act, for instance, by inserting the phrase " until the Parliament of Canada otherwise provides," enable the Dominion to fill up the gaps in the Constitution. Again there are special provisions as to education, the uniformity of civil law in Ontario, Nova Scotia and New Brunswick, and agriculture and immigration.† Besides, s. 132 which deals with Canada's obligations *as part of the British Empire* arising under Treaties between the *Empire and foreign countries* has given rise to difficulties in regard to legislative competence of the Centre in relation to the Provinces, a subject which is discussed below. Cases have occurred since the passing of the British North America Act in which it has been found very difficult to reconcile the two sets of specific powers. It is just possible to conceive of a domain in which Provincial and Dominion legislations may overlap, and functions have very often in fact overlapped; and the difficulty involved has been sought to be solved by the principle that " where there is overlapping of enumerated powers of the Dominion and the Provinces respectively, neither legislation would be *ultra vires* if the field is clear; if, on this concurrent field, the two legislations meet, Dominion legislation prevails." ‡

In determining the jurisdiction of the Centre and the Provinces the first question to be decided is whether the subject matter of legislation falls within the enumerated powers of the Provinces in s. 92.§ If it does not fall under that section, it comes either under the specific Dominion matters of s. 91 or under the Dominion general power to legislate for " the peace, order and good government of Canada;" for it is assumed as a necessary incident to full internal powers of self-government that somewhere in the

* *Attorney-General for Canada* v. *Attorney-General for Ontario. Quebec and Nova Scotia*, A.C. 700 (1898).

† ss. 93-95.

‡ Sir Robert Garran: *Evidence before the Royal Commission on the Australian Constitution*, 1929, pp. 44-45; *Grand Trunk Railway of Canada* v. *Attorney-General for Canada*, (1907) A.C. 65; and *Attorney-General for Canada* v. *Attorney-General for British Columbia and Others*, (1930) A.C. 111.

§ *Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 96.

Dominion under the Constitution power to legislate must reside * If s 92 does not hit the legislation in question, the point as to how it comes within Dominion competence is not of importance If, however, a particular piece of legislation comes under s 92, the further question must be answered, namely, whether it falls also under an enumerated head in s 91 If it does, the Dominion has the paramount power of legislating in reference to it If again it falls within neither set of enumerated heads, then the Dominion may have power to legislate under the general words at the beginning of s 91 †

For proper construction of the allocation of powers both the lists must be read together, for obviously there are subjects which may belong to both the lists In other words, as the Judicial Committee has often held,‡ the two sections (91 and 92) must be read together and the language of one interpreted, and, when necessary, modified by that of the other Certain instances have been cited by Jennings and Young § For example, " the public debt and property "|| belongs to the Centre while " the borrowing of money on the sole credit of the Province " and " the management and sale of the public lands belonging to the Province and of the timber and wood thereon¶" have been assigned to the Provinces Similarly while the Centre has power to legislate as to " the regulation of trade and commerce "** the Provinces are given such subjects as " the incorporation of companies with Provincial object, " " property and civil rights in the Province " and " generally all matters of a purely local or private nature in the Province "†† Again the Centre's jurisdiction extends to " the raising of money by any mode or system of taxation "‡‡ while " direct taxation within the Province in order to the raising of a

* *Attorney General for Ontario* v *Attorney General for Canada* A C 571

† *Toronto Electric Commissioners* v *Snider and Others Attorney General for Canada and Ontario Interveners* (1925) A C 396

‡ *The Citizens Insurance Co of Canada* v *William Parsons* (1881) 7 App Cas 96 and *Charles Russell* v *The Queen* (1882) 7 App Cas 829

§ *Constitutional Laws of the British Empire* p 138

|| Para 1 of s 91

¶ Paras 3 and 5 of s 92

** Para 2 of s 91

†† Paras 11 13 and 16 of s 92

‡‡ Para 3 of s 91

revenue for Provincial purposes "* is a subject which belongs to the Provinces. These instances are illustrative and not exhaustive.

These provisions must not be so interpreted as giving rise to unnecessary conflicts and thus frustrating valid or competent legislation. In possible cases of such conflicts regard must be had to the purpose of the projected legislation; and, as Jennings and Young put it while referring to entry 15 of s. 91 and entry 2 of s. 92, " if the purpose of legislation is to regulate banking, then only the Dominion is competent; if the purpose is to impose a direct tax on banks for the raising of Provincial revenue, then the Province is competent."† In no circumstances can a Province try by legislation or administrative action in fact to regulate banking in the exercise of its taxing power for Provincial purposes.‡

" Principles of Federalism."

In construing the Canadian Constitution no reliance is to be placed on what has been called the " principles of federalism." In other words, the doctrine of " implied prohibitions " or of " immunity of instrumentalities " so much in vogue in the United States has been rejected generally by the Privy Council and has no application to the Canadian system.§ It does not mean, however, that it is open to a legislature so to exercise a power as to interfere with the exercise of a power by another legislature. What it means is that the exercise of a power by a legislature is void only when it does in fact interfere with the exercise of a power by another legislature and not merely when it may have the possibility in extreme circumstances of interfering with the exercise by the latter of its functions as was asserted in *McCulloch* v. *Maryland*.|| As Lord Loreburn has so aptly observed, in the interpretation of a completely self-governing Constitution founded upon a written organic instrument such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and in what it forbids. When the text is ambiguous as, for example, when words establishing two mutually

* Para. 3 of s. 92.

† *Constitutional Laws of the British Empire*, p. 139.

‡ *Russell* v. *The Queen*, 7 App. Cas. 829.

§ *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575.

|| (1819) 4 Wheaton, 316.

exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act *

There are a large number of authoritative adjudications bearing on the relations between the Federal Centre and the Provinces in Canada These may be divided into two groups, namely, (1) those in support of the Provinces and (2) those in support of the Dominion It was often claimed that the Dominion was entitled to control industry throughout the entire territory, but judicial interpretation has defeated that view In *Russell* v *The Queen*† it was held that the Federal Parliament had power to enact the Canada Temperance Act of 1878 as seeking to establish a uniform system for prohibiting the liquor traffic throughout Canada not only by virtue of the general legislative power but also by virtue of "the trade and commerce power and criminal law" as against the Provincial control of "property and civil rights" Sir Montague E Smith, speaking for the Privy Council, observed that there was no ground or pretence for saying that the evil or vice hit by the Act in question was local or existed in one Province and that Parliament, under colour of general legislation, was dealing with a Provincial matter only The manner of bringing the prohibitions and penalties of the Act into force did not alter its general and uniform character The legislation was clearly intended to apply a remedy to an evil which was assumed to exist throughout the Dominion It was also laid down that the Act not coming under any of the subjects exclusively assigned to the Provinces, it was not necessary to discuss the question whether its provisions fell within any of the classes of subjects enumerated in s 91

Two groups of decided cases

But in *Hodge* v *The Queen*‡ it was ruled a year later that Ontario had power to establish a local licensing system in the Province, entrusting as it did by statute powers of regulation to local authorities, and it was further decided in a case subsequently heard by the Privy Council that the

* *Attorney General for Ontario* v *Attorney General for Canada* A C 124

† App Cas 829 (1882)

‡ App Cas 117 (1883)

McCarthy Act which sought to set up a local licensing system for the liquor traffic throughout the Dominion was *ultra vires* of the Dominion Parliament. It seems that the decision in *Russell* v. *The Queen* can only be supported now, not on the footing of having laid down a principle of interpretation as to the general words at the beginning of s. 91, but on the assumption that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that national intervention was urgently called for.

Similarly an attempt by the Dominion to control insurance business has been defeated by the Privy Council.* The principle established is that the " commerce " power of the Dominion has no reference to the right to regulate by licensing any business not assigned to it. That principle cannot be evaded by claiming that the " power is really an exercise of the right to enact criminal law to regulate aliens or to control immigration." In delivering the judgment of the Judicial Committee in *Attorney-General for Ontario* v. *Reciprocal Insurers* Duff J., for example, said that " in accordance with the principle......it is no longer open to dispute that the Parliament of Canada cannot by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and purposes, exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be held as valid."† Again, although the power to deal with sea coast inland fisheries belongs to the Federal Centre, it cannot be interpreted as giving it an unlimited authority to do anything connected with fishing. In 1925, relying on the doctrine enunciated by Duff J., Lord Sankey in *Toronto Electric Commissioners* v. *Snider* declared the Dominion Industrial Disputes Investigation Act of 1907 invalid as interfering with the " civil rights " of the Provinces. The Council refused to uphold the Act either under the general legisla-

* *Attorney-General for Canada* v. *Attorney-General for Albertar; Attorney-General for Ontario* v. *Reciprocal Insurers.*

† A.C. 328 (1924).

tive power calculated to serve the interests of peace and good government in the Dominion or as an enactment under criminal law or commerce power

On the opposite side reference may be made to the Privy Council's upholding of the Combines Investigation Act of the Dominion * The object of that measure was to secure the punishment of persons who took part in the operation of combines to the injury, or in restraint, of trade and commerce It was, however, contrary to the decision in *The Board of Commerce Act*, 1919, and *The Combines and Fair Prices Act*, 1919 † The Combines and Fair Prices Act enabled the Board established by the Commerce Act to restrain and prohibit the formation and operation of such trade combinations for production and distribution in the Canadian Provinces as the Board might consider to be detrimental to public interest The Board was further authorised to restrict, in the cases of food, clothing and fuel, accumulation of those necessaries of life beyond the amount reasonably required, in the case of a private person, for his household The surplus was in such instances to be offered for sale at fair prices Certain persons were excepted such as farmers and gardeners Legislation setting up the Board was held to be invalid as not falling either within the commerce power or criminal law It was decided also that there was at the time no national emergency justifying Federal intervention by the exercise of general power to legislate for Canada

It has also been established in an important case that occurred in 1932‡ that the Dominion authorities had powers of a wide character essential to secure public interest It was stressed in the judgment *inter alia* that the interpretation of the Constitution must not be allowed to permit of abrogation of the terms of the original contract on which the Federation was based Accordingly, in the case of Radio Communications in Canada the Council rejected in 1932§ any power of regulation by the Provinces, relying on the Dominion's general power to legislate for the peace, order

* *Proprietary Articles Trade Association* v *Attorney General for Canada* (1931) A C 310

† 1 A C 191 (1922)

‡ A C 54 (1932)

§ A C 304 (1932)

and good government of the entire territory, and emphasising the fact that " communications between the Provinces and other parts of the world were expressly made matters of Federal concern."

The historical background in Canada.

The judicial decisions should be examined in a historical perspective if only to find out to what extent the conventions of the Constitution created or sustained by the Courts may depart from the actual statutory provisions and the intention of the fathers of the Statute. There is no denying the fact that the Canadian federation, paradoxical though it may sound, had originally begun by treating the Provinces as no more than local self-governing bodies and that some Provincial legislation was from the year 1867 right up to the year 1896 disallowed not merely as being *ultra vires* of the legislatures concerned or unconstitutional but as being " inequitable, unsound in principle, or destructive of private or contractual rights." The point was explained at some length by Macdonald who spoke of the Canadian scheme as one in which the Federal Legislature would control " the general mass of sovereign legislation " and observed :*

> " We have strengthened the general (*sic*) Government. We have given the general legislature all the great subjects of legislation. We have conferred on them, not specifically and in detail, all the powers incident to sovereignty, but we have expressly declared that all subjects of general interest, not distinctly and exclusively conferred upon the local governments and local legislatures, shall be conferred upon the general Government and legislature."

The reason assigned by Macdonald for thus departing from the American model was that the insistence on ' State rights ' had brought about an unhappy Civil War in the United States and that it was necessary, according to Macdonald and the framers of the Constitution in Canada, to profit by America's bitter experience and avoid that great source of weakness of the Central Government which had been the cause of political disruption in the United States. Care was taken to emphasise Macdonald's point at Westminster when the Quebec

* Macdonald in Confederation Debates, 6th Feb., 1865.

resolutions were given legal form and shape Thus Lord Carnarvon on behalf of the British Government stated that "the real object is to give to the Central Government those high functions and almost sovereign powers by which general principles and uniformity of legislation may be secured in those questions that are of common import to all the Provinces, and at the same time to retain for each Province so ample a measure of municipal liberty and self-government as will allow and indeed compel them to exercise those local powers which they can exercise with great advantage to the community "* Both Macdonald and Carnarvon, the former representing the Colonial mind and the latter speaking for the Imperial authorities, agreed that the Federal Government and Legislature must be competent to decide what matters were of national, as distinct from "purely local," importance Macdonald, in writing to the Colonial Secretary in 1868 expressed his hope that in any contest over jurisdiction between the federation and the constituent Provinces, the former "must win "

Judicial decisions and constitutional development

Then followed a series of cases and decisions from 1867 to 1896 in which the idea predominated that the Provincial legislatures in Canada were no better than big County Councils in England In *Russell* v *The Queen*, a case which, as has already been pointed out, serves to bring the "unitary bias" of the Canadian federal plan into bold relief and is by no means the only decision in the series, the view seemed to have been taken that "if a Federal Act were requisite for the peace, order and good government of the Dominion, it was *intra vires* of the Federal Legislature, even though it might affect incidentally property and civil rights granted exclusively to the Provinces "† But even as far back as 1878 Strong J, warned that such application of the extraordinary federal prerogative power might threaten "the independence of the Provinces "‡ The position taken up in *Russell* v *The Queen* was revised in *Hodge* v *The Queen* *Attorney-General for the Dominion* v *Attorney-General*

* *The Fourth Earl of Carnarvon* Vol I p 305
† Kennedy *Essays in Constitutional Law* pp 90 91
‡ *Severn* v *The Queen* 2 S C R p 96

for Alberta, and *Toronto Electric Commissioners* v. *Snider*, some of which cases have been referred to above.

An interesting theory of Canadian constitutional law has evolved not, be it noted, through statutory enactments but out of the clash of opinions, judicial and political, which has for so many years centred round the controversy on the Federal power in relation to the " State rights." According to that theory, the status of the Canadian Provinces is not Municipal used in its restricted sense, and their legislation within the constitutional ambit defined in the statute is exclusive and supreme just as within its own sphere Dominion legislation or Imperial legislation is plenary and absolute. Provincial laws, within their assigned and specified list, do not appear at present to be open to challenge on the ground that they are " unjust " or "inequitable" or "interfere with contractual obligations." They may be disallowed or quashed on the doctrine of *ultra vires*.*

Provinces not County Councils.

This development of constitutional law in Canada has provoked from Professor Kennedy a declaration to the effect that " Canada began its political existence with the scales heavily weighted in favour of the Central authority. To-day the Canadian Provinces enjoy powers almost greater than those of the States of the American Union."† Professor Kennedy goes so far as to hold that " the legal and constitutional developments of the last sixty years have certainly tended to strengthen the fissiparous elements in our national life."‡ It appears to us, however, that this eminent constitutional authority has taken a more gloomy and pessimistic view of the situation than the circumstances warrant. There is, in the first place, no large volume of opinion in the Provinces, separately or collectively, in favour of secession from the Federation as is unmistakably the case with at least one of the Australian States. In the second place, the Dominion Government still retain legal power to disallow Provincial legislation, particularly when that legislation may, in their

* *The Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick*, (1892) A. C. 437.

† Kennedy: *Essays in Constitutional Law*, p. 84.

‡ *Ibid*, p. 85.

opinion, imperil national unity, and if the Privy Council by its recommendations to His Majesty in given cases stands in the way of the Federal machinery, they may take power under the Statute of Westminster to destroy the appeal altogether, for the Statute, as we have seen, does not in any way protect the Judicature Acts from which the Council mainly derives its authority

Besides, as Professor Kennedy has himself suggested,* the justiciable disputes between the Centre and the Provinces as those between a Dominion and the Imperial authorities may be amicably settled by consultation and agreement between the parties concerned or by some sort of an impartial and independent Tribunal inspiring the confidence of both the parties An effective corrective to "fissiparous" elements is supplied also by the complexities of modern economic conditions which require uniformity of treatment and call for national legislation as distinguished from purely local treatment There should be no exaggeration of the "rights" that the Canadian Provinces have secured through the Privy Council decisions They have earned no right to secede from the federation It is extremely doubtful if they can destroy the general law-making power of the Federal Parliament The Privy Council and, in some cases, the Dominion Courts have by their construction of the Constitution Act accorded the Provinces the status they should enjoy under a federal plan They have, in short, ceased to be County Councils or Municipalities as was contemplated by Macdonald

Three important Privy Council decisions

It is perhaps true that until 1931 the Privy Council tended generally to curtail the legislative competence of the Dominion Parliament in so far as it put a generous and liberal interpretation on the power of the Provinces to legislate exclusively as to Property and Civil Rights Exception was, however, made in grave national emergencies when the Dominion rather than the units was allowed to loom large in the picture as was asserted in *Attorney-General for Ontario* v *Attorney General for Canada,*† *Fort Frances Pulp and*

* Kennedy *Essays in Constitutional Law* pp 91 148 49
† A C 348 361 (1896)

Power Co. v. *Manitoba Free Press Co.*,* and *Attorney-General for Canada* v. *Attorney-General for British Columbia.*† In the last of these cases Lord Tomlin summarised the principles of construction that had been established as a result of the decisions of the Privy Council. They are (*i*) that the legislation of the Dominion, so long as it relates to subjects expressly enumerated in s. 91, is of paramount authority, even though it trenches upon subjects enumerated in s. 92; (*ii*) that the *general power* of legislation granted to the Dominion by s. 91 must be confined to such matters as are unquestionably of national interest and importance and must not trench upon subjects enumerated in s. 92, unless such matters have attained such dimensions as to affect the body politic of the Dominion; (*iii*) that it is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the Provincial legislatures, are necessarily incidental to effective legislation expressly enumerated in s. 91; and (*iv*) that mere overlapping does not invalidate either Federal or Provincial legislation if the field is clear, and Federal law supersedes Provincial law where the field is not clear.

On the general question of the distribution of powers between the Dominion and the Provinces as provided for under ss. 91 and 92 and the effect of s. 132 three recent Privy Council decisions may throw some light, although we are afraid the position is yet as uncertain and indefinite as it could be in any circumstances. These are (*i*) the *Aeronautics case*,‡ (*ii*) the *Radio case*,§ and (*iii*) the *International Labour Conventions case.*|| All these cases went to the Privy Council on appeal from the Canadian Supreme Court and in each case the legislation in question had been referred by the Governor-General in Council to the Supreme Court.

The question in (*i*) was, as was pointed out by Lord Sankey, L. C., whether the control and regulation of aeronautics was a subject on which the Dominion Parliament was alone competent

* A.C. 695, 704, 706 (1923).

† A.C. 111, 118 (1930).

‡ *In re Regulation and Control of Aeronautics in Canada*, (1932) A.C. 54.

§ *In re Regulation and Control of Radio Communications in Canada*, (1932) A.C. 304.

|| *Attorney-General for Canada* v. *Attorney-General for Ontario and Others*, (1937) A.C. 326.

to legislate or whether it was in each Province so related to Provincial property and civil rights and local matters as to exclude the Dominion from any (or from more than merely a limited) jurisdiction in respect of it The Council's answer was that the subject belonged to the Dominion Lord Sankey then proceeded to add that while the Courts should be zealous in upholding the charter of the Provinces as enacted in s 92 it must no less be borne in mind that the real object of the Act was to give the Centre those high functions and almost sovereign powers by which uniformity might be secured on all questions which were of common concern to all the Provinces as members of a constituent whole His lordship stated that there might be cases of emergency where the Dominion was empowered to act for the whole and that there might also be cases where the Dominion was entitled to speak for the whole and that not because of any judicial interpretation of ss 91 and 92, but by reason of the plain terms of s 132, where Canada as a whole, having undertaken an obligation, was given the power necessary and proper for performing that obligation

It should be noted that the Dominion legislation in question was in pursuance of a " Convention, relating to the Regulation of Aerial Navigation " and that, knowing as he did that it was so, Lord Sankey observed that the governing section in this case was s 132 which gave the Parliament and Government of Canada all powers necessary or proper for performing the obligations towards foreign countries arising under Treaties between the Empire and foreign countries

In the case of (*ii*) the issue was whether it was within the competence of the Dominion to legislate as to radio communication in terms of Art 2 of the International Radiotelegraph Convention, 1927, which had been ratified and confirmed on behalf of His Majesty's Government in Canada by an instrument signed by the Secretary of State for External Affairs, Canada Here also the Privy Council's answer was in the affirmative Speaking for the Board Viscount Dunedin observed

> " Canada as a Dominion is one of the signatories to the Convention In a question with foreign powers the persons who might infringe some of the stipulations in the Convention would not be the Dominion of Canada as a whole but would

between the British Empire and foreign countries "* It was laid down that for the validity or otherwise of such legislation reference was to be made not to s 132 but to ss 91 and 92 and that power to legislate for the purpose of performing the obligations of a Treaty did not reside exclusively in the Dominion Parliament Lord Atkin said

> For the purposes of ss 91 and 92 that is to say, the distribution of legislative powers between the Dominion and the Provinces there is no such thing as Treaty legislation No one can doubt that that distribution was one of the most essential conditions probably the most essential condition in the inter Provincial compact to which the British North America Act gave effect No further legislative competence was obtained by the Dominion from its accession to international status and the consequent increase in the scope of its executive functions The Dominion cannot merely by making promises to foreign countries clothe itself with legislative authority inconsistent with the Constitution which gave it birth '

And again

> It must not be thought that the result of the present decision is that Canada is incompetent to legislate in performance of Treaty obligations In the totality of legislative powers, Dominion and Provincial together she is fully equipped But the legislative powers remain distributed and if in the exercise of her new functions derived from her international status she incurs obligations they must so far as legislation is concerned when they deal with Provincial classes of subjects be dealt with by the totality of powers—in other words by co operation between the Dominion and the Provinces

It must be noted, by the way, that the Council also rejected the view that the Dominion was competent to enact the statutes in question on the ground that s 91 authorised it to " make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces "

* *The British Empire* (A Report on its Structure and Problems by a Study Group of Members of the Royal Institute of International Affairs) p 28

It is of course common ground that the obligations contemplated in s. 132 were obligations the Parliament and Government of Canada were required to discharge as part of the British Empire and not as an international person and that at present the Dominion has acquired a new status in international law for certain purposes. But the issue is, to whom the power belongs of giving effect to the International Labour Conventions which were signed and ratified on behalf of Canada. Doubtless the Imperial authorities have no such power. Lord Atkin is also correct in holding that Treaty* legislation is not specifically mentioned in ss. 91 and 92 which deal with the distribution of powers. But it cannot lie in a vacuum.

We have already seen that Viscount Dunedin in the *Radio case* used the words "Convention equivalent to a Treaty." The point urged by Lord Atkin seems to suggest a distinction without a difference, and it is not unreasonable to argue that for the purposes of s. 132 a "Convention." is to all intents and purposes a "Treaty." If a Treaty in strict form is not a Convention, it includes a Convention. The distinction is *pro forma* rather than substantial. It is difficult to understand how, if the Dominion could under s. 132 take measures to implement undertakings on behalf of the Empire, it could be precluded from doing so in regard to its own undertaking. Moreover, if s. 132 is interpreted to mean only Treaties between the whole Empire and foreign countries, the section is useless. For now no Treaties are made on behalf of the Empire as a whole. His lordship, however, tries to find a solution and holds that action may be taken, if at all, by what he calls the totality of powers, that is to say, in co-operation between the Dominion and the Provinces. With respect we differ from his lordship's view despite the hope that he has expressed that Duff, C. J.'s judgment in *In re Natural Products Marketing Acts*, on which he substantially relies, would form the *locus classicus* of the law on the point and would preclude further disputes.

* A Treaty is signed by a person having full powers under the Great Seal, and the ratification, if any, is also under the Great Seal, whereas a Convention is signed by a person authorised in that behalf by the Government concerned and ratified by that Government.

In matters of general concern to the nation as a whole as to which no specific allocation has been made the jurisdiction belongs to the Centre rather than to the units; and according to that principle, if, as Lord Atkin holds, the provisions of s. 132 do not apply to the Labour Conventions in question, the matter should be construed as coming within the general purview of the Centre. In this connection Lord Sankey's stress in the *Aviation case* that the Provinces "are members of a constituent whole" is significant and ought to be given due weight The intention of the framers of the Act may also be gathered from the fact that they deliberately charged the Dominion with the discharge of obligations mentioned in s 132 both in respect of the Centre and the units, although at the time when the British North America Act was enacted Canada was accorded a status different from what it has come to enjoy at present

If the strict letter of the law is held to constitute a disability on the Centre acting alone in implementing the International Labour Conventions, the Court should be guided by the spirit when the letter does not, as apparently in this case, provide a solution It should rely on the doctrine enunciated by Lord Loreburn, L C, that "when the text is ambiguous recourse must be had to the context and scheme of the Act" Support for this contention may be found also in Lord Sankey, L C's observation in *Edwards and Others* v *Attorney-General for Canada and Others** to the effect that "the British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits" and that "the object was to grant a Constitution to Canada" It was held in that judgment that the word "person" in s 24† of the British North America Act included females and that women were eligible to be summoned to and become members of the Senate of Canada, although at the time when the Act was passed the framers thereof might have no idea that women might become legislators

* A C 124 (1930)

† The Governor General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate, and, subject to the provisions of this Act every person so summoned shall become and be a member of the Senate and a Senator"

Lord Atkin's reference to the "totality of powers" is no remedy, for nowhere does the Act provide for a machinery, executive or legislative, for the purpose of securing co-operation between the Dominion and the Provinces. Should his lordship's ruling be final, a deadlock might ensue if, for example, some Provinces voted with the Federation and the others voted against it. The position in such a case would be absurd and intolerable. Again it will be seen that in s. 132 a distinction is definitely made between " Canada " and the " Provinces " so that it was the intention of Parliament to exclude the Provinces from any jurisdiction in respect of obligations arising under Treaties or Conventions. The new status acquired by the Dominion does not necessarily vest in the Provinces power to make arrangements of an international character or to implement them unless authorised in that behalf by a competent authority; and the distinction between the Centre and the units has been brought out very clearly in s. 7 (3) of the Statute of Westminster, 1931. Nor was Lord Atkin, in our judgment, justified in disposing in a rather summary fashion of the "peace, order and good government" clause of s. 91; for differential treatment accorded to the producers in different Provinces in regard to the hours of work, a minimum wage, conditions in factories, etc., might provoke grave disorder and affect the peace and good government of the Dominion as a whole.*

II. *The United States*

Federation in U. S. A.

In America before the war of liberation the units that afterwards came to be known as the United States,† had been separate political entities, each with its own distinct history and antecedents. The necessity of common action, in their war against England, led them as free contracting parties to draw up a scheme

* Lord Atkin's judgment has been differently commented upon in different quarters. Canadian opinion is generally opposed to it whereas British opinion is sharply divided. Read *The Canadian Bar Review* (Special Constitutional Number), June, 1937, Vol. XV, No. 6.

† Originally there were 13 States and at present the number is 48.

of federation Under that scheme the States pledged themselves to joint action in some fundamental matters It was laid down in the Treaty *

> I That each State retains its sovereignty, freedom and independence and every power jurisdiction and right which is not by this confederation expressly delegated to the United States in Congress assembled,
>
> II That the said States hereby severally enter into a firm league of friendship with each other for their common defence, the security of their liberties and their mutual and general welfare binding themselves to assist each other, against all forces offered to or attacks made upon them or any of them on account of religion sovereignty, trade, or any other pretence whatever

Constitutional and economic difficulties

It was soon discovered that the limitation of powers vested in Congress had produced great constitutional and economic difficulties Alexander Hamilton then pointed out that the only remedy lay in the total abolition of separate sovereignties of the States and in the creation of a central unitary Government But his view did not commend itself to the States, and as a matter of fact in many of them even the limited powers of Congress came to be looked upon with suspicion It became nevertheless more and more evident that the powers conferred upon Congress were inadequate to the exigencies of government and the preservation of the Union, and as a result a Convention of the delegates from the States was summoned for the purpose of revising the articles of confederation to meet the requirements of the situation The Convention arrogated to itself the powers and functions of a Constituent Assembly and drafted the Constitution of the American Federal Republic in 1787 When the Constitution thus drawn up was adopted certain States submitted several amendments desiring that those amendments should form part of the Constitution Some of them were adopted at " ratification " forming as they do the ten amendments of 1791 Eleven further amendments followed from time to time of which the thirteenth, fourteenth and fifteenth amendments came as a direct result of the

* Arts 2 and 3

Civil War. The twenty-first amendment adopted in 1933 has repealed the eighteenth amendment which prohibited the manufacture, sale, or transportation of intoxicating liquors.

Notwithstanding the amendments and the changes they brought about, the main basis of distribution of powers in America remains almost the same, that is to say, only the delegated powers lie vested in Congress, the States continuing to exercise the residuary powers. The Constitution has shown remarkable power of resistance against drastic change. This is largely due to the special procedure for constitutional amendment requiring a two-thirds majority in Congress and ratification by three-fourths of the States. Under s. 8 of Art. I of the Constitution the powers of Congress are enumerated giving it altogether 18 subjects. The eighteenth item does not refer to any particular subject or subjects, but it is intended to give flexibility to all preceding powers. It is known as the "implied powers" clause. It authorises Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The express powers of the Federal Centre are not self-executing, *i.e.*, the exercise of each of these powers requires a law. The power to do certain things carries with it the right to make or promulgate laws or regulations incidental thereto, and "the implied powers" clause in the U.S.A. Constitution is intended to regularise any action that may be taken by the Centre for the purpose of exercising rights which have been conferred upon it under s. 8 of Art. I of the Constitution. The Supreme Court has generally given the clause a liberal interpretation, leaving to Congress a large range of choice with regard to means which might be adopted to execute its powers under the law.

Federal use of implied powers.

In the celebrated case of *McCulloch* v. *Maryland* Chief Justice John Marshall interpreted the clause in the following words: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are

plainly adapted to that end, and which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional " It is well-known that the Federal authorities to-day make a rather liberal use of "the implied powers" clause in the performance of some of their most important functions As Munro puts it, "the power to establish carries with it the power to maintain The power to regulate carries with it the power to establish agencies of regulation The power to secure a designated end carries with it the power to use whatever means are plainly adapted to that end "*

It is being felt in modern times, largely on account of the very wide range of legislation caused by the extension of spheres of Governmental activity, that the framers of the American Constitution gave the Federation too little rather than too much authority, notwithstanding the possibilities of expansion of their powers under the " implied powers " clause Some thinkers hold that were the Constitution being framed to-day, the Centre would be given more powers than they enjoy at present Judicial decisions are, however, more or less influenced by this consideration, and it has been found that the Supreme Court puts a generous construction on the " implied powers " clause with the result that the position of Congress has, to a considerable extent, been strengthened The lead in strengthening the Federal centre came decisively from Chief Justice Marshall † Reference has already been made to *McCulloch* v *Maryland* and the principles laid down by the Chief Justice

The facts of the case are these By way of reply to the National Bank with a Federal charter founded in 1816 to remove the prevailing financial confusion brought about by the activities of the States, Maryland promulgated a law providing that if a Branch bank were established without the assent of the State, its notes must be printed on stamped paper unless the Bank paid a specified tax The branch national bank in Baltimore refused to oblige the State, and McCulloch, the cashier of the bank, was sued The matter was brought before the Supreme Court The Chief

* Munro *The Constitution of the United States*, p 56

† Read an interesting chapter on Constitutional Law under Marshall in *A Constitutional History of the United States* by Andrew C McLaughlin pp 385 400

Justice examined the nature and character of the Union and denied the assertion that it was a Government of the States. The States, he argued, might have assembled in conventions for the purposes of the Union, but they were conventions of the people and chosen and sanctioned by them. "The Government of the Union then," Marshall declared, "is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." The States by necessary intendment had no right to stand between the people and their Union, and the Maryland Act was declared unconstitutional not only on the principle of the sovereignty of the people vested in the Federation but also on the doctrine of its "implied powers."*

In 1824 in *Osborn* v. *Bank of United States*† Marshall had again to defend "national unity" against "State rights" and reaffirmed the principles enunciated in *McCulloch* v. *Maryland*. In 1821 Marshall replied from the bench, which sat to decide the case of *Cohens* v. *Virginia*,‡ to the Virginia pamphleteers who asserted *inter alia* that the Constitution did not contemplate a centralised and consolidated union, but a system in which authority was at most divided, that there was nothing in the Constitution expressly authorising the Central Government and the Federal judiciary to be judges of the extent of their own powers and that it did not deny the State courts power to pronounce finally upon the validity of State legislation.

The facts of the case are briefly stated. Cohens was fined for selling lottery tickets in Virginia by a local court. His defence was that inasmuch as the lottery was authorised by Congress he was within his legal and constitutional rights to sell the tickets in Virginia. The case was on appeal heard by the Supreme Court. Here also the main issue was the nature of the Union and the extent of its sovereignty *vis-a-vis* "State rights." Counsel for the defendants urged that the Federal Court had no jurisdiction to review the finding of a State Court, a contention which Chief Justice Marshall rejected

* 4 Wheaton, 316. † 9 Wheaton, 728. ‡ 6 Wheaton, 264.

without hesitation Then he went on to examine the character of the Union and made a significant but forceful statement "That the United States," Marshall, C J, remarked, "form, for many and for most important purposes, a single nation has not yet been denied In war, we are one people In making peace, we are one people In many other respects the American people are one The Constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void These States are constituent parts of the United States They are members of one great Empire—for some purposes sovereign, for some purposes subordinate "* But Cohens had to pay the fine as the Court held that the Federal law authorising the lottery should not be construed as applying outside the corporate limits of Washington There was, however, no doubt as to the authority of Congress to legislate, if necessary, for the entire Union including its constituent States

Inter State commerce

There are two leading American cases on the subject of inter-State commerce in which again Marshall figured as Judge and which will be of considerable interest to the Courts in India The question raised in 1824† before the Supreme Court was as to the validity of a New York Act granting to certain persons "the exclusive right to navigate New York waters in steamboats" It was not denied that "the completely internal commerce of a State is subject to State legislation," but the issue was larger and had a bearing on inter State and foreign commerce which was within the sphere of Congress The issue was, could a particular State, in exercise of its complete authority over transportation in waters within its territorial limits, obstruct the natural sources of communication between one State and another and exclude foreign ships or boats from its harbours? Marshall decided against New York and observed that "Commerce, undoubtedly is traffic, but it is something more, it is intercourse," and that the power to regulate it belonged to Congress and extended to all parts of the Union ‡

* 6 Wheaton 364 413 14

† *Gibbons* v *Ogden* 9 Wheaton

‡ Similar decisions were given in *International Text Book Co* v *Pigg* in 1910 and *Public Utilities Commission* v *Attleboro Steam and Electric Company* in 1927

In *Crown* v. *Maryland* which came before the Court in 1827 Marshall refused to admit the right of a State to require the importers of foreign goods to pay a State license fee. "When the importer," in his opinion, "has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while receiving the property of the importer in his warehouse, in the original form or passage........., a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."*

The principle thus laid down has subsequently been applied as a general rule to inter-State and foreign commerce.† Marshall, it is thus clear, has extended the sphere of federal legislation by broad and liberal construction of the "implied powers" clause, asserted the limitations on the powers of the States and upheld the authority of the Supreme Court to review decisions of the State courts and interpret in the light of the Constitution the policy of the State Governments. If, as we maintain, there have been far-reaching constitutional developments in the United States, they have largely been influenced by the judgments of Chief Justice Marshall, and there is need for caution when undue emphasis is sought to be laid on the so-called residual power of the States. Much more has taken place to the detriment of "State rights" than most foreign observers can imagine since the constitution of the United States was first adopted; and Professor Kennedy perhaps was not indulging in mere rhapsody when he declared: "The American republic began with a theory of State rights. To-day we watch the ever-increasing growth of federal power."‡

Conflicts of jurisdiction.

But there is still some confusion as regards the powers of the rival authorities, namely, the Centre and its constituent units, which has in no small measure blocked urgent social legislation. The delegation of powers is supplemented by express prohi-

* 12 Wheaton, 441-42.

† *Leisy* v. *Hardin*, 135 U.S. 100.

‡ Kennedy: *Essays in Constitutional Law*, p. 84.

bitions which are a peculiar feature of the American Constitution. The most important of the prohibitions are set out in s. 9 (as regards the United States) and s. 10 (as regards the States) of Art. I as well as in the Fourteenth Amendment, but s. 9, in so far as it is confined to clause 4, has been amended by the Sixteenth Amendment so that Congress has now power "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." Some of the prohibitions apply to Congress, but a number including the provisions forbidding legislation designed to impair the obligations of contracts* or depriving any person of property without "due process of law"† are specifically to apply against the States.

Some of those prohibitions, multifarious in number and complex in character, have frequently tended to produce deadlocks in legislation as being applicable by implication against both Congress and the States. The Royal Commission on the Australian Constitution, 1929, justly observed that as "Congress can only legislate on the subjects assigned to it, and within the limitations and subject to the prohibitions applying to its powers, the prohibitions which are addressed to the States, and which restrict the general powers on legislation otherwise reserved to them, preclude in effect any legislation in the United States of the character described in the prohibitions unless and until the Constitution is amended, and they have in fact stood in the way of much social legislation."‡

The Supreme Court's powers of interference

In recent years, it should be noted, the maxims laid down by Marshall have received a severe set-back in the judicial decisions delivered from time to time. The authors of the American Constitution could not foresee in 1787 such wide extensions of Governmental activities as modern conditions have necessitated in all parts of the civilised world, not to speak of the United States. On strict and literal interpreta-

* Cl. I of s. 10 of Art. I.

† s. 1 of the Fourteenth Amendment. *Cf.* the interpretation of the due process clause dealt with in Chapter VIII *supra*. Under the Fifth Amendment the due process clause applies also to Federal Acts or measures.

‡ Report of the Royal Commission on the Australian Constitution, 1929, pp. 76-77.

tion of the Constitution it is difficult to sustain the bold and ambitious measures which the Federal authorities under Mr. Roosevelt's inspiration have often sought to enact and enforce. A series of decisions by the Supreme Court lends support to this view. In the course of one year, *i.e.*, 1935, as many as five decisions declared Acts of the Federal Centre unconstitutional.

In *Panama Refining Company* v. *Ryan* (Hot Oil case), for example, the Supreme Court nullified s. 9 of Title I of the National Industrial Recovery Act of 1933 on the ground that it was improper delegation of legislative power to the President.* In *Perry* v. *United States* the joint resolution of 1933 declaring payments in gold to meet obligations to be against public policy, etc., was pronounced invalid in so far as it applied to obligations on the part of the United States.† In *Railroad Retirement Board* v. *Alton R. R.* the Railroad Retirement Pension Act of 1934 was declared unconstitutional because it took away the property of the railroads without "due process of law" as provided for in the Fifth Amendment and also because it was improper interference by Congress with commerce among the several States.‡ In *Schechter* v. *United States*, s. 3 of Title I of the National Industrial Recovery Act already referred to was held unconstitutional "on the grounds (*a*) that Congress lacked authority to delegate its powers to the President, (*b*) that the codes attempted to regulate transactions within a State which lay outside the power of Congress, and (*c*) that certain provisions were contrary to the due process of law clause."§ In *United States* v. *William M. Butler et al. Receivers of Hoosac Mills Inc.*, the Agricultural Adjustment Act was declared invalid on the ground that it interfered with the right of the States to control and regulate local activities.

Apropos of the *Schechter case* Professor Harold J. Laski says that it has asserted three propositions "each of which is momentous in its impact." First, no emergency can permit the legislature or the executive to depart from the plain letter of the law. Secondly, the Constitution of 1787 gives Congress no power to interfere with commerce unless it is definitely of an inter-State nature from which it follows

* 293 U.S. 388.
† 294 U.S. 330.
‡ 295 U.S. 330.
§ 295 U.S. 495.

that it cannot control the conditions of manufacture in any industry as "this is a State prerogative" Thirdly, Congress has no authority to delegate powers of legislation to the President Professor Laski may be perfectly right in his analysis of the position in the United States as revealed in the pronouncements of the Supreme Court particularly in view of the principles of construction followed as a general rule under the Anglo-Saxon system, but it does not mean that the ends Mr Roosevelt attempted to secure by Federal action can be achieved by State action The result is deadlock Bold efforts have, however, been made with a measure of success to counter the effect of these decisions by changes in the personnel of the Supreme Court

III *The Commonwealth of Australia*

The Australian Federation

The terms of the Australian Federation are to be found in a series of resolutions passed at the Constituent Convention which met at Sydney in 1891, at the instance of Sir Henry Parkes, its elected President The resolutions were in the following terms

I The powers and rights of the existing Colonies to remain intact excepting as regards any such powers as it may be necessary to hand over to the Federal Government

II No alteration to be made in the States without the consent of the legislatures of such States as well as of the Federal Parliament

III Trade between the Federated Colonies to be absolutely free

IV Powers to impose customs and excise duties to be vested in the Federal Government and Parliament

V Military and Naval forces to be under one command

VI The Federal Constitution to make provision to enable each State to make amendments in each Constitution, if necessary, for the purposes of Federation

The Sydney Convention was followed by another Convention which met at Adelaide six years later and, after a short adjournment, reassembled at Sydney and again at Melbourne The prin-

ciples of Federation which had been accepted in 1891 remained substantially the same, and the Constitution was drafted in accordance therewith. An Australian delegation carried the draft over to London for the necessary legislative sanction of the Imperial Parliament. The result was the passing of the Australian Commonwealth Act in 1900. Under a Royal Proclamation the Constitution embodied in the Act came into operation in 1901 creating a federation known as the Commonwealth of Australia.

Australia follows the American model.

The problem of the distribution of powers vexed the fathers of the Australian Constitution just as it had vexed those of the American and Canadian Federations. And the experience garnered in the latter two countries stood the Australian statesmen in good stead. The Constituent Convention had before them both the Canadian and American examples and utilised them to the fullest extent. In Canada the United States procedure of distribution of powers was reversed inasmuch as it was discovered that many complicated controversies had arisen in America in respect of State rights leading to the weakening of Central control. The Australian Convention, however, came to the conclusion that the difficulties that had cropped up on the question of State rights in the United States "were the results not of the principles of distribution but of the fewness of the specific powers assigned and of the limitations with which these powers had been beset." It was accordingly contended that were those difficulties removed the American system would make far greater simplicity and efficiency than the Canadian pattern. Consequently specific powers were delegated to the Federal Parliament in Australia and the residuary powers left to the constituent States.* This results, as was pointed out by the Privy Council in the *Colonial Sugar Refining case*, not only from the broad principle enunciated in s. 51 but also from s. 107 which enacts that "every power of the Parliament of a Colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State,

* s. 107.

continue as at the establishment of the Commonwealth or of the admission or establishment of the State, as the case may be."

Exclusive and Concurrent Powers

In ss 51 and 52 the subjects assigned to the Federal Parliament are enumerated But the difference in the phraseology of the two sections must be noted S 51 does not give the Commonwealth Parliament *exclusive* powers while such powers, subject to the Constitution, are assigned to it by s 52 in respect of (i) the seat of government of the Commonwealth, and all places acquired by it for public purposes, (ii) matters relating to any department of the public service the control of which is by the Constitution transferred to the Executive Government of the Commonwealth, and (iii) other matters declared by the Constitution to be within the *exclusive* powers of the Parliament Thus the *exclusive* powers referred to in item (iii) of s 52 extend also to duties of customs and excise and bounties on the production or export of goods,* by implication to the naval or military forces and the imposition of any tax on the property of any kind belonging to the Commonwealth† and to coinage and legal tender in payment of debts ‡

On thirty nine different subjects the Commonwealth Parliament is competent under the *general* powers conferred by s 51 to legislate, *subject to the Constitution*, for the peace, order, and good government of the Commonwealth The onus of proof that the Commonwealth Parliament has power to legislate as to a particular subject matter which was before federation vested in the legislatures of the States rests on the Commonwealth itself § It is not to be understood that the States can in no circumstances legislate on matters specified in s 51 They can The rule of construction is that the legislative authority of the Commonwealth Parliament with respect to any subject mentioned in s 51 is not to be construed as exclusive " unless from the nature of power, or from the obvious results of its operations, a repugnancy must exist so as to lead to a necessary conclusion that the power was intended

* s 90
† s 114
‡ s 115
§ *Attorney General for Australia* v *Colonial Sugar Refining Co*, A C 237 (1914)

to be exclusive," otherwise "the true rule of interpretation is that the power is merely concurrent."* Where, upon this rule of construction, the Federal power is not by necessary intendment *exclusive* the States can legislate unless the Federal Parliament occupies the field itself. S. 109 provides that "when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." The scope of some of the items in s. 51 is restricted or extended, as the case may be, by the provisions of ss. 93, 99, 100, 114 and 115.

The scope of Federal authority.

Then it is to be remembered that under s. 51 (*placitum* XXXVI) the Commonwealth Parliament is empowered to make laws on matters in respect of which the Constitution makes provision "until the Parliament otherwise provides." In exercise of those powers the Commonwealth Parliament has been able to enter upon certain distinct fields of legislation not expressly assigned to it. The report of the Royal Commission has referred to 8 items of such legislation, and in most of those cases the judicial decisions have upheld the claims of the Federal Parliament. Apart from the powers of alteration of the Constitution by referendum under s. 128, the framers of the Australian Constitution have thus accepted in a large number of the sections the principle of giving the Commonwealth Parliament power to deal with a variety of subjects to which the phrase "until the Parliament otherwise provides" applies, and sought to devise a scheme having the merits both of rigid and flexible Constitutions.

As Jennings and Young point out, "there are over thirty powers of incidental constitutional amendment which the Commonwealth Parliament may exercise without bringing s. 128 into use."† The Centre derives incidental or ancillary powers from *placitum* XXXIX in s. 51 which provides that the Commonwealth Parliament shall have power to make laws with respect to "matters incidental to the execution of any power vested.........in the Parliament or in

* Quick and Garran: *The Annotated Constitution of the Australian Commonwealth*, p. 509.

† *Constitutional Laws of the British Empire*, p. 214.

either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth " On the other hand, however, the Dominion of Canada has, and the Australian Commonwealth Government have not, power to veto legislation passed by their respective constituent units

Implied prohibitions and immunity of instrumentalities

Now, during the earlier period of the Federal system the judges of the Commonwealth High Court adopted on the authority of the decision in *McCulloch v Maryland* the doctrines of "implied prohibitions" and "immunity of instrumentalities" In *D'Emden v Pedder* they held that a Federal officer could not be compelled by a State to use its stamp on a receipt for his salary * Again it was held in *Deakin v Webb* and *Lyne v. Webb* that a State could not subject a Federal officer to income tax provided by its statute † Delivering the judgment of the Court Griffith, C J, observed that where any power or control was expressly granted there was included in the grant, to the full extent of the capacity of the grantor, and without special mention, every power and control the denial of which would render the grant itself ineffective It was pointed out that the provisions embodied in the Australian Constitution were undistinguishable in substance, though varied in form, from the provisions of the United States Constitution and that it was not an unreasonable inference that its framers had intended that like provisions should receive like interpretation His lordship then quoted extensively from the judgment in *McCulloch's case* In that judgment the Supreme Court remarked *inter alia* "If the States may tax one instrument employed by the Government in the execution of its powers, they may tax any and every other instrument They may tax the mail, they may tax the mint, they may tax patent rights, they may tax judicial process, they may tax all the means employed by the Government to an excess which would defeat all ends of government This was not intended by the American people " With reference to the point

* 1 C L R, 91 (1904)
† 1 C L R 585 (1904)

suggested that the doctrines enunciated in *McCulloch's case* were not applicable to the Commonwealth by reason of the power of veto reserved to the Crown, Griffith, C. J., said that the assent of the Crown or the non-exercise of the power of veto could not regularise an invalid law.

In *Webb* v. *Outrim,** however, the Privy Council rejected those doctrines; it refused to accept " the principles of federalism " as asserted in the United States and by the High Court of Australia. It held that there was no analogy between the American and Australian Constitutions which would sustain the implied restraint upon the States' powers in the Commonwealth. Lord Halsbury was perhaps correct, if we may say so with respect, in maintaining that the thesis that a similarity, not of words, but of institutions, must necessarily carry with it as a consequence an identity in all respects was not sustainable. The knowledge of the American Constitution on the part of those who had a hand in framing the Australian Act and their supposed preference for this or that model constituted no safe guide for the construction of a statute. If the words of the Statute were unambiguous and clear, there was in law no justification for the inference that on American analogy there was " implied prohibition " in the Australian Constitution also. But there seems to be no substance in Lord Halsbury's doctrine that when a State Act in the Commonwealth was assented to by the Crown it necessarily became a valid law as having the force of an Imperial Act, unless clear provisions to that effect were incorporated in the Constitution.

In *Baxter* v. *Commissioners of Taxation*† the Commonwealth High Court, however, reaffirmed the " principles of federalism " contrary to the decision of the Privy Council. In this case the Income Tax Commissioners of New South Wales sought to recover income tax from a Federal officer residing in that State. The issues raised in the case were (*i*) whether the High Court or the Judicial Committee was under the Constitution the ultimate arbiter upon questions as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, and (*ii*) whether under the Constitution a State could, in the exer-

* A.C. 81 (1907).
† 4 C. L. R. 1087 (1907).

cise of its legislative or executive authority, interfere with the exercise of the legislative or executive authority of the Commonwealth, and, conversely, whether the Commonwealth could in like manner trammel the legislative or executive authority of the States As regards the first issue, the High Court held, relying on s. 74, that it had been set up as an Australian tribunal to decide questions of purely Australian domestic concern without appeal or review, unless the High Court in the exercise of its own judicial functions, and *upon its own judicial responsibility*, formed the opinion that the question at issue was one on which it should submit itself to the guidance of the Privy Council Accordingly the High Court was in no way bound by the decision of the Judicial Committee in *Webb v Outrim*, a view which recorded the unanimous judgment of the High Court On the second issue the majority observed that the implication of a prohibition or mutual interference was as necessary in the case of the Australian Constitution as in that of the United States and that the doctrine laid down in *D Emden v Pedder* should once more be affirmed notwithstanding the decision in *Webb v Outrim* The rule thus laid down it was added, was "safe for the States and safe for the Commonwealth" The High Court refused a certificate for appeal to the Privy Council, and special leave to appeal was refused by the Council "the amount at stake being inconsiderable and the controversy having been closed"*

"The controversy having been closed" had reference to the fact that legislation had been enacted by the Federal Parliament subjecting under certain conditions members of the Federal Parliament as well as Federal officers to the State income tax. Future conflicts of decision were sought to be eliminated by the exercise by the Federal Parliament of its power to make the jurisdiction of the High Court *exclusive* under ss 76 and 77 "in all matters involving any questions as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any States, or as to the limits *inter se* of the constitutional powers of any two or more States"†

* *New South Wales Taxation Commissioners* v *Baxter* A C 214 (1908)

† Jennings and Young *Constitutional Laws of the British Empire*, p 216 The High Court has power under s 74 to grant a certificate for appeal to the Privy Council

The doctrine enunciated in *Baxter* v. *Commissioners of Taxation* was relied on and applied in a long catena of Australian cases, especially in *Municipal Council of Sydney* v. *The Commonwealth*,* *Roberts* v. *Ahern*,† *The Commonwealth* v. *New South Wales*,‡ *The King* v. *Sutton*,§ *Attorney-General for New South Wales* v. *Collector of Customs*‖ and *The State Railways Servants' case*.¶ It was laid down in the *State Railways Servants' case* that the doctrine of "implied prohibition" was *reciprocal* so that it applied as much to interferences by the Commonwealth with State instrumentalities as to the State interferences with Federal instrumentalities. Nor was it restricted to taxation only.

The decision in *Baxter* v. *Commissioners of Taxation* was departed from by the High Court itself thirteen years later in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co*.** It rejected the doctrines of "implied prohibitions" and "immunity of instrumentalities" as upheld in numerous earlier decisions already cited. It was pointed out by the learned judges that for the proper construction of the Australian Constitution it was essential to bear in mind two cardinal features of the Australian system which were interwoven in its texture and, notwithstanding considerable similarity of structural design, including the depositary of residual powers, radically distinguished it from the American Constitution. They must be taken into account in determining the meaning of its language. One was the common sovereignty of all parts of the British Empire; the other was the principle of responsible government. The combined effect of these features was that the expression "State" and the expression "Commonwealth" comprehended both the strictly legal conception of the King in right of a designated territory, and the people of that territory considered as a political organism. The High

for any special reason. That power it exercises sparingly, and a notable instance of the grant of such a certificate by the High Court was furnished by *Attorney-General for Australia* v. *Colonial Sugar Refining Co.*

* 1 C.L.R. 208.

† 1 C.L.R. 406.

‡ 3 C.L.R. 807.

§ 5 C.L.R. 789.

‖ 5 C.L.R. 818.

¶ 4 C.L.R. 488.

** 28 C.L.R. 129 (1920).

Court held that in view of the two features of common and indivisible sovereignty and responsible government, it was wrong to endeavour to find one's way through the Australian Constitution by the borrowed light of the decisions, and sometimes the *dicta*, that American institutions and circumstances had drawn from the American courts. Citing a number of Privy Council decisions as regards the rules of interpretation of a written constitution it proceeded to quote Lord Selborne in *Re v. Burah** where his lordship said that the only way in which the courts of law could properly decide the question of the validity of a legislative measure was "by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which negatively, they were restricted. If what had been done was legislation, within the general scope of the affirmative words which gave the power, and if it violated no express condition or restriction by which that power was limited, it was not for any Court" to enquire further or to enlarge constructively those conditions and restrictions. The High Court then observed that the doctrine of "implied prohibition" was not sustainable and that in so far as any decision rested on it the same was to be regarded as unsound.

The High Court has since adopted the principles of construction followed by the Privy Council in interpreting the Australian Constitution. The decision in the *Engineers' case* was applied in *Commonwealth v. New South Wales*† where Issacs J. observed: "The conclusion to which we were invited to come in interpreting the Constitution upon the assumption that New South Wales is 'a sovereign State' would be both mischievous and unfounded. We applied the standard universally in British Courts, by giving effect to the actual bargain made with all its mutual rights and obligations as they are stated on the face of the instrument." It was laid down that a State was liable in tort, arising out of collision between steamers belonging to the two Governments. The contention of the State that it was "sovereign" and that to derogate from its sovereignty there must be a State law was rejected.

* 3 A. C. 904

† 32 C.L.R. 200 (1923)

It is not to be supposed that the decision in the *Engineers' case* on which the High Court relied for its later judgments completely challenged the earlier decisions. For it was still maintained, relying on the provisions of s. 109, that while a Commonwealth statute could interfere with a State instrumentality a State law could not bind a Federal instrumentality. It overruled the decision in the *Railways Servants' case* in this respect.* The real question, however, was one of repugnancy between Commonwealth and State laws and not one involving the doctrine of "implied prohibition" so that, as was asserted in *Pirrie* v. *McFarlane*,† s. 109 could not be construed as preventing a State from legislating in respect of Federal officers provided the State legislaton in question was enacted in the absence of Commonwealth legislation or was not repugnant to any existing Commonwealth statute on the subject. It was held in the case just cited that members of the Federal defence force were subject to State motor car legislation in the absence of Commonwealth legislation on the subject repugnant to the State law. As was pointed out by the learned judges of the High Court, the effect of State legislation, though fully within the powers preserved at the time of the Union by s. 107, might in a given case depend on s. 109. The principle applied was that respective measures of the Commonwealth and the States must be given full operation within their respective areas and subject-matters subject, in the case of conflict, to the supremacy of valid Commonwealth legislation in so far as that supremacy was measurable in terms of s. 109.

The effect of the War on judicial pronouncements.

During the Great War the Australian High Court, like the Privy Council in respect of Canada, has by rules of judicial interpretation extended to a considerable extent the powers of the Commonwealth. In this connection the judgments in *Farey* v. *Burvett*,‡ *Pankhurst* v. *Kiernan*§ and *Burkard* v. *Oakley*‖ may be cited. It was again held in *Victoria* v. *Com-*

* C.L.R. 488.
† 36 C.L.R. 170 (1925).
‡ 21 C.L.R. 433 (1916).
§ 24 C.L.R. 120 (1917).
‖ 25 C.L.R. 422 (1918).

*monwealth** that "where a clothing factory was established to supply clothing for the military forces of the Commonwealth during the War legislation authorising the supply of clothing to Commonwealth Government Departments other than the Department of Defence, to the Government Departments of Victoria, and to the local authorities of the same State, was valid as incidental to defence power † This was of course contrary to the decision in *Commonwealth v Australian Shipping Board*‡ where the ruling was to the effect that 'the defence power did not authorise the establishment of a business for trade purposes in time of peace merely because it might assist in the maintenance of a naval dockyard and naval workshops §

Acute controversies on financial powers

Sometime ago a very serious controversy arose over an important financial issue in the Commonwealth It may be recalled that an agreement had been arrived at between the Commonwealth and the constituent States under which the Federation undertook to give to the States three quarters of the customs and excise revenue collected for the first ten years of the Commonwealth A system of payments of 25s *per capita* to the States was to be adopted after the end of that period These financial arrangements were upset as the result of the War The Commonwealth gave up the system in 1927 and instead undertook the responsibility for the State debts from July, 1929 Elaborate arrangements were made with regard to agreed sums by the States and the Commonwealth on Interest and Sinking Fund

That agreement was approved on referendum in 1928 The New South Wales Government persisted in defaulting in respect of interest payment on their debt A Federal Act was passed making it clear that once the Auditor-General certified, fresh sources of revenue might be seized by the Commonwealth Government Another measure, namely, the Financial Emergency (State Legislation) Act, was enacted to frustrate the attempt on the part of New South Wales to levy

* 52 C L R 533 (1935)
† Jennings and Young *Constitutional Laws of the British Empire* pp 219 20
‡ 39 C L R 1 (1926)
§ Jennings and Young, *op cit* p 219

10 per cent. of the value of every mortgage in the State. The dismissal of the New South Wales Prime Minister, Mr. Lang, by the Governor eased matters to some extent, for it led to the rise in power of a party anxious to maintain the obligations of the State. But it cannot be ignored that the measures taken by the Commonwealth Government were extraordinarily drastic; and already there is a loud cry for the vindication of State rights, although the New South Wales case was an emergency and might have justified drastic intervention by the Federal Government.

Signs of revolt in certain States.

The signs of revolt against the Federation are discernible in Western Australia. That State decided through a referendum by a majority of nearly 2 to 1 in favour of secession from the Commonwealth and against the alternative proposal in favour of a Convention to modify and reconstruct the Federal Constitution. From the very beginning of the Federation a small group of people scattered over the whole country had been opposed to the scheme. This sentiment in Western Australia has been inspired by the belief that in the absence of a Central authority it could become self-sufficient in the matter of manufactures. The recent agricultural depression there was believed to have been accentuated by the tariff policy of the Commonwealth designed in the interests of a certain class of manufacturers.

Politically also the feeling is deep and widespread that power has passed to Eastern States at the expense of Western Australia. The fact is that Anti-Federation sentiment has spread very rapidly there. But although a resolution was passed in Western Australia by a substantial majority, it is difficult legally to put it into operation. The Constitution, which provides that the Australian States have agreed "to unite in one indissoluble Commonwealth under the Crown of the United Kingdom........., and under the Constitution,"* contemplates that no State can legally take measures disruptive of the Federation and that secession on its part from the Federation is not within its legal competence.

* Preamble to the Act.

The proper procedure of constitutional amendment

Of course the Constitution may be amended in accordance with the procedure laid down in s 128 of the Commonwealth Act, but it is unlikely that the electors in States other than Western Australia would countenance such a move. Unless, therefore, the Imperial Parliament passes an Act for the purpose, a drastic amendment of the Constitution as contemplated in the Western Australian resolution is out of the question; but there also the door is no longer open, for in a recent Western Australian case which, by the way, was argued with great skill the Imperial authorities have justly decided that under the Statute of Westminster, 1931, an amendment of the Constitution has ceased to be an Imperial concern* and that, if urgent and desirable, it should be sought for through the appropriate Australian machinery of legislation † The only alternative in the circumstances seems to be a violent act of disruption The Prime Minister of the Commonwealth Government, it is significant to note, announced a Commission to assess impartially the disabilities of certain States including Western Australia under the present Constitution with a view to counteracting the secession movement The Commonwealth Government have also decided to co-operate with the State Governments to review the Commonwealth Constitution What would be the ultimate effect of that step is something more than one can predict at this stage ‡

In 1930, however, three Bills were introduced in the Commonwealth House of Representatives The first Bill proposed transfer to the Centre of the "industrial power" The second proposed transfer to the same authority powers relating to trade and commerce and the third

* s 4 of the Statute of Westminster 1931

† s 8 of the Statute of Westminster 1931

‡ Efforts at the amendment of the Constitution had been periodically made in Australia These had generally been dominated by an anxiety to strengthen the Federal Centre in regard to inter State trade and commerce all kinds of corporations conditions of labour etc The War gave them a quietus in view of the liberal interpretation of Federal powers by the Courts But in 1919 a fresh effort to extend the powers of the Common wealth was made in vain Similarly Mr Bruce failed to realise his object a few years later In Canada appointment of a Commission on Federal relations was announced by the Prime Minister, Mr Mackenzie King in 1937

States Governments and placed them in a position of inferiority in their relations with the Federal machinery. Of course there is lack of clarity in the absence of corresponding changes in the Commonwealth Act (save perhaps s. 105A), but there is little room for doubt that the residual power originally vested in the States by the Act has been rendered anaemic. New South Wales challenged the validity of the Financial Agreements Enforcement Act 1932, enacted under s. 105A. The High Court, by a majority held in *New South Wales v. Commonwealth** (No. 1 and No. 3) that it was valid. Starke J. observed:

> The States are subjected by the Constitution to the legislative power of the Commonwealth to enforce and execute the Agreement. The national power is paramount and may be exerted against the property, moneys and revenues of the States in whatever form they exist and wherever found.'

The Federal structure in both Canada and Australia is similar in certain essentials to that in the United States.† All these three systems have these common features, namely, the supremacy of the Constitution, the division of powers and functions between Central and State or Provincial authorities and the final authority enjoyed by competent courts to define and adjudicate on the spheres of jurisdiction of the Federation and the constituent units. They are all set out in written and somewhat rigid instruments as distinguished from the essentially flexible constitution of the United Kingdom.

Federal systems in U. S. A., Canada and Australia

But there are important differences in principles as well as in details. In the first place, as a general rule, neither the Commonwealth nor the Dominion, unlike the United States, has made any provision for a comprehensive charter of the fundamental rights of the people. Secondly, the States in U. S. A. have in law been given a wider measure of authority in legislation and administration than is allotted to the Australian States and still more than is exercised by the Canadian Provinces. It seems to be remarkable, as

* 46 C. L. R. 246 and 264 (1932).

† For an interesting account of this aspect of the Federal system, read Keith's *The Constitutional Law of the British Dominions*, pp. 292-96.

Professor Keith observes, that the Australian States can delegate powers to the Federal Parliament, indicating a constitutional arrangement which is foreign to the conception of the United States. Thirdly, and this perhaps results from the second, the States in U.S.A. have not been prepared to submit to the doctrine that judgments of their courts are liable to alteration or revision by any Federal Court.* It follows, therefore, that the State Courts are supreme in all State issues; and the Federal Court generally follows State decisions when issues concerning the States *alone* are incidentally brought before it.

In the Dominion and the Commonwealth,† however, appeals from the Provincial or State Courts lie respectively to the Supreme Court and the High Court thereby securing a certain measure of judicial uniformity. Again, in America, there is a separation of jurisdiction between the Federal Courts and the State Courts. Federal Courts, as already indicated, decide on Federal matters while State Courts adjudicate upon State laws. Both in Canada and Australia Provincial and State Courts are competent to exercise jurisdiction in regard to Federal issues. There are other points of difference and of these perhaps the most important are, as was stressed by the Australian High Court in the *Engineers' case*, the "common and indivisible sovereignty" and responsible government which are inherent in the Dominion system and which the United States Constitution negates.

The systems in Canada and Australia compared and contrasted.

It is interesting to note the differences that exist between the Australian Commonwealth and the Dominion of Canada. First, Governors of the States in Australia are appointed by His Majesty by Commission under the Royal Sign Manual without reference to the Commonwealth Government and the States can, if necessary, directly correspond with the Imperial Government. In Canada, on the other hand, Lieutenant-Governors of Provinces are appointed by the Governor-General in Council‡ and hold office during the

* ss. 1 and 2 of Art. III.
† s. 73 of the Commonwealth Act.
‡ s. 58.

pleasure of the Governor-General * In strict law there is a distinction between the Governor-General in Council and the Governor-General so that the Dominion Act on strict interpretation vests power to appoint in the Governor-General acting on the advice of his responsible Ministers while power to dismiss belongs to the Governor-General But in practice power to dismiss is exercised by the Dominion Government It should, however, be remembered that when once appointed Lieutenant-Governors are as much representatives of the Crown in the Provinces as the Governor-General is in the Dominion †

The Upper House in Australia is composed on the basis of the equality of the States‡ and is elected by the people In Canada the Federal principle is not strictly observed inasmuch as its several Provinces are not treated on terms of equality in the matter of representation § It is also vitiated by the provision for appointment of Senators by the Dominion Governor-General ‖ The residuary powers in Australia, as we have seen, belong to the States as in the United States, and they can legislate as to matters not exclusively within the jurisdiction of the Commonwealth, although such legislation, if repugnant to the Commonwealth legislation, must, to the extent of repugnancy, be void In the Dominion the system followed is different where the residue of powers is left with the Dominion The Dominion assumes that, unless deprived of jurisdiction, the Provincial Courts can deal with all Federal issues, although it is responsible for the creation of Federal Courts The Commonwealth Constitution leaves Federal issues to be decided by Federal Courts, and the State Courts can enter upon Federal jurisdiction when it is assigned to them by the Parliament of the Commonwealth ¶

* s 59

† *The Liquidators of the Maritime Bank of Canada v The Receiver General of New Brunswick* (1892) A C 437

‡ s 7 of the Commonwealth Act

§ Canada is divided into three broad divisions namely Ontario Quebec and the Maritime Provinces (Nova Scotia and New Brunswick) each division getting 24 members (s 22)

‖ ss 24 27 of the British North America Act Compare the Table of seats (Provincial Legislative Council) in the Fifth Schedule to the Government of India Act 1935 where provision is made for appointments to the Councils by Governors

¶ s 77 (III) of the Commonwealth Act

In Canada the Governor-General in Council is given power* in regard to denominational schools in the Provinces such as those that existed in law at the time of the Federation. Appeals lie to him on behalf of such denominational schools in relation to education. Sub-section (4) of s. 93 specifies conditions under which the Federal Parliament may legislate in regard to education.† The Dominion is competent to disallow Provincial legislation while the Commonwealth has no power to interfere with or override State legislation in the sphere left to the States by the Constitution. In Canada the interpretation of the Constitution belongs finally to the Privy Council. In Australia it generally‡ belongs to the High Court. In Canada the Constitution is subject to alteration by the Imperial Parliament. In Australia the alteration of the Constitution is a matter which under s. 128 belongs to the Parliament and the people of the Commonwealth. Both by law and constitutional usage the powers of the Australian States are wider than those of the Canadian Provinces, but in one respect the Statute of Westminster has accorded the latter a position of greater authority. For example, power to repeal Imperial legislation given by s. 2 of the Statute belongs to the Canadian Provinces under s. 7 (2) and not to the Australian States to which the Colonial Laws Validity Act of 1865 continues to apply.

IV. India

The Indian problem of federation is and has been on a different footing. Under the British administration, particularly on the assumption of the Government by the Crown in 1858, the Centre had been a unitary Government and the Provinces had been

* Sub-sections (3) and (4) of s. 93 of the British North America Act.

† *Ottawa Separate Schools* v. *Mackell*, (1917) A.C. 62.

‡ s. 74 of the Commonwealth Act, which deals with the question of appeals, has been held in certain cases not to cover all possible cases as to the interpretation of the Constitution. For example, certain provisions of Chapter V of the Constitution refer to restrictions on legislative power without raising any jurisdiction as between the States *inter se* or as between a State and the Commonwealth. [*James* v. *Cowan*, (1932) A.C. 542; *James* v. *Commonwealth of Australia*, (1936) A.C. 587.] In such cases appeal may be brought by leave of the Privy Council.

treated in law and in fact as the administrative units of the Centre. More accurately, the Central Government was looked upon as a subordinate branch of His Majesty's *Government in the United Kingdom*, and the Provinces, viewed in that light, were no better than municipal or rural public bodies with extremely limited powers in respect of legislation and taxation.

It is true that there was considerable devolution under the Government of India Act, 1919, so that the powers of the Imperial Parliament in relation to the Government of India were relaxed to a large extent. Similarly, the powers of the Secretary of State and the Secretary of State in Council and the Government of India in Provincial matters, especially in regard to the transferred subjects, were restricted.* But legally and technically Lord Curzon's picture of the Government of India, as painted when the noble lord quarrelled with the late Mr Montagu and forced the latter's resignation from the Cabinet, held good. The Secretary of State and the Secretary of State in Council exercised a considerable measure of administrative and financial control over the Government of India.

Under s. 33 of the Government of India Act the Governor-General in Council was required to pay due obedience to such orders as he might receive from time to time from the Secretary of State in regard to the civil and military government of the country. Under s. 2 the Secretary of State exercised powers and performed duties relating to the Government or revenues of India, which were analogous to the powers and duties exercisable, prior to the India Act of 1858, by the East India Company, either alone or by the direction or with the sanction or approbation of the Commissioners for the Affairs of India. Subject to the provisions of that Act and the rules made thereunder, he was vested with the general powers of superintendence, direction and control over all acts, operations and concerns which related to the Government or revenues of India. S. 33 read with ss. 2 and 131 made, as Sir Tej Bahadur Sapru pointed out, the subordination of the Government of India to the Secretary of

* s. 19A and the rules made under it (No. 835 G. dated the 12th December 1920).

State complete.* We are, however, concerned here more with the relations of the Provincial Governments with the Central Government than with the powers of the latter *vis-a-vis* the Secretary of State, although the source of political power is relevant to the Federal theory.

Executive authority in a Province under the previous Act.

As regards the executive authority of a Province, s. 45 (1) laid down that, subject to the provisions of the Act and the rules made thereunder, every local Government was required to obey the orders of the Governor-General in Council and keep him constantly and diligently informed of its proceedings and all matters which were, in its opinion, to be reported to him, or as to which the Governor-General in Council required information. A local Government was under the latter's superintendence, direction and control in all matters relating to the government of the province. The powers of superintendence, direction and control vested in the Governor-General in Council were, in relation to the transferred subjects, exercised only for such purposes as were specified in the rules made under the Act,† but the Governor-General in Council was the sole judge as to whether the purpose of the exercise of such powers in any particular case came within the purposes so specified.‡

Power was accorded under s. 45A read with s. 129A to the Governor-General in Council, with the sanction of the Secretary of State in Council, to make rules for the classification of subjects, the devolution of authority in respect of certain subjects to local Governments, the allocation of revenues or other moneys to those Governments, the use, under the authority of the Governor-General in Council, of the agency of local Governments in relation to Central subjects and the transfer from among the Provincial subjects of subjects to the administration of the Governor acting with Ministers. These rules were not subject to repeal or alteration by the Indian Legislature or any local Legislature.§

* Sapru : *The Indian Constitution*, p. 18.

† ss. 45A and 129A and the Devolution Rules made thereunder (No. 308-s, dated the 16th December, 1920).

‡ s. 45A (3).

§ s. 129A (1).

they could be so framed as to make different provisions for different Provinces.*

Besides, the appointment of Governors other than the Governors of the three Presidencies was made by His Majesty after consultation with the Governor-General,† a provision for differential treatment as between the Provinces which has been repealed under the Government of India Act, 1935.‡ The Act of 1919 (now repealed), in other words, placed the local Governments in subordination to the Governor-General in Council, and the latter to the Secretary of State in Council. It merely enabled the Secretary of State in Council, so far as the transferred subjects in the Provinces were concerned, by rules "to relax or remove his hitherto all-embracing powers of superintendence and control."§

Powers of local Legislatures

The powers of a local Legislature were enumerated in s. 80A of the Government of India Act. It was competent to make laws for the peace and good government of the territories for the time being constituting the Province. But its powers were derived from sub-section (2) of the section subject to the provisions of sub-section (3) which laid down that it could not, without the previous sanction of the Governor-General, make or take into consideration any law—

(a) imposing or authorising the imposition of any tax, unless the tax was a scheduled tax|| and exempted from the provision made by rules under the Act; or

(b) affecting the public debt of India or the customs duties, or any other tax or duty then in force and imposed by the authority of the Governor General in Council for the general purposes of the Government of India, provided that the imposition or the alteration of a tax scheduled as aforesaid would not be deemed to affect any such tax or duty; or

* s. 129A (2).

† s. 46 (2).

‡ s. 48 (1) of the India Act, 1935.

§ Read para. 5 of the Explanatory Memorandum appended to the Government of India Bill, 1935, by His Majesty's Government.

|| Read the Scheduled Taxes Rules published under Notification No. 317 S. dated the 17th December 1920 in the *Calcutta Gazette Extraordinary* of the 3rd January 1921.

(*c*) affecting the discipline or maintenance of any part of His Majesty's naval, military or, air forces; or

(*d*) affecting the relations of the Government with foreign Princes or States; or

(*e*) regulating any Central subject; or

(*f*) regulating any Provincial subject which had been declared by rules under the Act to be either in whole or in part subject to legislation by the Indian Legislature, in respect of any matter to which such declaration applied; or

(*g*) affecting any power expressly reserved to the Governor-General in Council by any law then in force; or

(*h*) altering or repealing the provision of any law which, having been made before the commencement of the Government of India Act, by any authority in British India other than that local Legislature, was declared by rules under the Act to be a law which could not be repealed or altered by the local Legislature without previous sanction;* or

(*i*) altering or repealing any provision of an Act of the Indian Legislature made after the commencement of the Government of India Act which by the provisions of such first-mentioned Act might not be repealed or altered by a local Legislature without previous sanction.

It appears that a local Legislature had power to legislate as to any subject, so far as the Province in question was concerned, with the previous sanction of the Governor-General, the only restriction being that it had no power in any circumstances to make any law affecting any Act of Parliament.† The unitary character of the Constitution is demonstrated not by the extent, amplitude or limitations of the powers of a local Legislature but by the source from which they were derived, that is to say, the Governor-General's previous sanction or his subsequent assent to a local Act.‡

Under the scheduled taxes rules made under sub-section (3) of s. 80A read with ss. 45A and 129A the Governor-General in Council created two schedules. The schedule No. I enumerated

* Read the Local Legislatures (Previous Sanction) Rules published under Notification No. 318-S, dated the 17th December, 1920, in the *Calcutta Gazette Extraordinary* of the 3rd January, 1921.

† s. 80A (4).

‡ Proviso to s. 80A (3).

the taxes which a local Legislature might impose or take into consideration, *for the purposes of the local Government*, without the sanction of the Governor-General,* and the schedule No II gave another list of taxes which that Legislature might impose, or authorise a local authority to impose, *for the purposes of such local authority*, without the previous sanction of the Governor-General † The Governor-General in Council could at any time, by Order, make any *addition to the taxes* enumerated in Schedules I and II to the rules ‡ Then under the Local Legislatures (Previous Sanction) Rules, a local Legislature was not entitled to repeal or alter, without the previous sanction of the Governor-General—

(1) any law made by any authority in British India before the commencement of the Indian Councils Act 1861, provided that the Governor General in Council might by notification in the *Gazette of India* declare that the provision would not apply to any such law which he might specify and if he did so previous sanction was not thereafter required for the alteration or repeal of that law § or

(2) any law specified in the Schedule to the rules or any law made by the Governor General in Council amending a law so specified

A comprehensive schedule was appended to the rules enumerating a series of Acts which a local Legislature was not competent to repeal or alter without the previous sanction of the Governor-General

Restrictions on the powers of a local Legislature almost like those incorporated in s 80A of the Government of India Act, 1919, are to be found in certain important spheres in some of the Federal Constitutions of the world, especially in the British North America Act,‖ although there was no similarity in the design and structure and incidence The Indian system was unitary and

* Rule 2

† Rule 3

‡ Rule 4

§ See the Government of India Notification (No 1407) dated the 19th May 1921 setting out a list of laws to which the previous sanction rule was not applied

‖ ss 91 and 92

hence the peculiar nature of restrictions on the Provinces. But Sir Tej Bahadur Sapru is right when he says that the "limitations with regard to Central subjects or laws protected by rules from interference by a local Legislature under clauses (*h*) and (*i*) narrow down the scope of the Councils."* What is more important, even in matters in which the previous sanction of the Governor-General was not required, it was the Governor-General in Council who laid down the rules giving a local Legislature some measure of autonomy.

Checks on Provinces.

All the checks referred to above on the powers of a local Legislature were further strengthened by s. 81A of the Government of India Act and the rules† made thereunder, according to which certain Bills passed by that legislature had to be reserved for the consideration of the Governor-General in respect of which the previous sanction of the Governor-General had not been obtained under sub-section (3) of s. 80A of the Government of India Act. The list of such protected subjects included, among others, Bills affecting the religion or religious rites of any class of British subjects in British India, or regulating the constitution or functions of any University, or affecting the land revenue of a Province in certain specific ways, or providing for the construction or management of a light or feeder railway or tramway other than a tramway within municipal limits, or having the effect of including within a transferred subject matters which had hitherto been classified as reserved subjects.

Furthermore, under the Local Government Borrowing Rules‡ it was provided that no loan could be raised by a local Government without the sanction (in the case of loans raised in India) of the Governor-General in Council, or (in the case of loans raised outside India) of the Secretary of State in Council; and in sanctioning the raising of a loan the Governor-General in Council or the Secretary of State in Council, as the case

* Sapru: *The Indian Constitution*, p. 110.

† Read Rule 2 of the *Reservation of Bills Rules* published under Notification No. 319-S, dated the 17th December, 1920, in the *Calcutta Gazette Extraordinary* of the 3rd January, 1921. Rule 3 provided for discretionary reservation.

‡ Read Notification No. 315-S, dated the 17th December, 1920, in the *Calcutta Gazette Extraordinary* of the 3rd January, 1921.

was, might specify the amount of the issue and any or all of the conditions under which the loan could be raised.* Analogous provisions in regard to the powers of borrowing of a local Government have been made in certain Federal Constitutions, to which reference has already been made, for the purpose of safeguarding national interests. In addition to all these limitations on the powers of a local Legislature, the Secretary of State in Council exercised powers in regard to certain servants holding appointments even under the transferred departments, their pay, pensions, allowances and gratuities.

Notwithstanding anything contained in the Mont-ford Report,† the provisions of the Government of India Act and the Devolution Rules made thereunder, the Provinces under the previous regime were no better than administrative units of the Centre, exercising extremely limited powers derived largely from the rules. The question was how these units were to be given rights and powers which had never belonged to them, consistently with national unity and without undermining the forces of centralisation and consolidation. We are afraid, therefore, that the controversy raised in connection with the location of residuary powers ignores the historical background of the problem and lacks that touch of realism which is essential to national progress and constructive statesmanship and which has given India during the last hundred and fifty years a sense of national consciousness and unity.

Conditions essential to Federation

Three conditions are essential to the success of a peculiarly difficult, complex and delicate machinery of government such as Federation. First, there must be a group of communities so far united by blood or language, by local contiguity or political traditions, as to desire union retaining at the same time their separate entities. So far as this condition is concerned, there are no formidable difficulties standing in the way of constituting this country into a Federal system. Secondly, none of the States or communities sought to be brought under a national union should be individually so powerful as to be able to resist foreign aggression

* Rule 3.
† Mont ford Report para 238.

and to maintain their own separate independence in complete isolation. Sir John Marriott points out that this consideration was the compelling motive which brought the Australian Colonies under a Federation and that so long as those Colonies had the Southern Pacific to themselves attempts at union had been repeatedly frustrated and that the emergence of predatory neighbours on the scene induced in them a more accommodating and helpful spirit. Thirdly, there should be no marked inequality among the constituent members of the union, and it may be noted in this connection that as a general rule equality is sought to be attained by according equal representation to the units on the Second Chamber of the Federal Legislature. John Stuart Mill ascribed the failure of the German Bund to utter lack of equality among the members of the Federation and it was maintained that the predominance of Prussia vitiated the Federal principle and ultimately led to the Prussianisation of Germany under Bismarck.

The problem complicated in India.

The problem of the Indian Federation becomes somewhat complicated when we come face to face with the second and third conditions mainly on account of the Indian States.* In this respect, however, we are assured by Sir John Simon and his colleagues that the difficulties are sometimes overstated. "A form of Federal association," they observe, "between areas which are British territory and units which are not British territory could be worked out; the analogy of the League of Nations itself, imperfect as the analogy is, is sufficient to show that States with widely differing forms of government may none the less unite for com-

* The units of the Federation as envisaged in the Government of India Act, 1935, are to be (*i*) the Governors' Provinces, (*ii*) the Indian States which may accede to the Federation, and (*iii*) the Chief Commissioners' Provinces. S. 5 (1), for instance, lays down that "it shall be lawful for His Majesty, if an address in that behalf has been presented to him by each House of Parliament and if the condition hereinafter mentioned is satisfied, to declare by Proclamation that as from the day therein appointed there shall be united in a Federation under the Crown, by the name of the Federation of India, (*a*) the Provinces hereinafter called Governors' Provinces, and (*b*) the Indian States which have acceded or may accede to the Federation; and in the Federation so established there shall be included the Provinces hereinafter called Chief Commissioners' Provinces." But the Chief Commissioners' Provinces, unlike the Governors' Provinces, are to be administered by the Governor-General acting, to such extent as he thinks fit, through Chief Commissioners to be appointed by him in his discretion [s. 94 (3)].

mon purposes and evolve a central organism for matters of common concern There is another point at which the analogy to which we have referred may prove helpful The Governors' Provinces of British India are all of very substantial size, and, whatever re-arrangements of Provincial boundaries may take place, it is improbable that any Provincial area would be so minute as not to require individual representation in the central body of a federated India But the Indian States vary enormously in size, from great countries to properties of a few acres, and, while individual membership would be no less essential for the greater States than for the British Provinces, some system of representation by rotation or other form of grouping must be contemplated for the smaller units * The constitution of the Chamber of Princes and the composition of the League of Nations are cited as instances showing that it is not impossible to devise a system of representation both for larger and smaller units

But at the same time the Simon Commission were aware of the fact that the application of the Federal principle to the area of Greater India (Indian States and British Indian Provinces) " cannot follow any known pattern, for the circumstances are unique, and its accomplishment must remain a distant ideal until means have been devised to meet and overcome obstacles which are at present extremely forbidding † Apart from stressing the difficulties such as the heterogeneous character of the units" and the disparity between non-British States possessed of a measure of *internal sovereignty* and British areas which derived their *autonomy from a common Centre*, the Commission took care to emphasise that it was essential to a Federal system to delimit strictly the scope of Central control ‡ The Federal principle is vitiated not only by the disparity referred to above but also by the marked difference in status and position and powers between the Governors Provinces and the Chief Commissioners' Provinces within British territory, both being treated as units of the Federation as contemplated in the Government of India Act, 1935

* The Simon Commission Report Vol II para 230
† *Ibid*
‡ *Ibid*

The new Act inaugurates the Federal system.

By s. 2 read with s. 5 the new Act introduces the Federal system for India; and the legislative powers conferred upon the Centre and the Provinces respectively and upon both the Centre and the Provinces concurrently are statutorily defined in Part V of the Act read with the Seventh Schedule. The distribution of financial resources is effected partly by the allocation of legislative powers and partly by Part VII. By s. 2 the Act resumes into the hands of His Majesty all powers hitherto exercisable in, or in relation to India, by any authority and then allocates to the various authorities constituted by or under the Act the whole of those powers so far as they are distributed by the Act. It also leaves His Majesty free to delegate such of those powers as are outside the scope of the Act, as he may think fit, to the Governor-General or the Governor to be exercised on his behalf. The result is that the Governor-General and the Governors exercise, by statute or delegation, on behalf of His Majesty, the powers respectively vested in them subject to the supervision and control by the Secretary of State and, in the case of the Governors, subject to the supervision and control also by the Governor-General, in certain matters specified in the Act.* Any powers connected with the exercise of the Crown's functions in its relations with Indian States shall in *India,* if not exercised by His Majesty, be exercised only by, or by persons acting under the authority of, His Majesty's Representative for the exercise of those functions of the Crown.†

The executive authority at the Centre and in the Provinces.

The executive authority of the Federation is defined in s. 8;‡ and although the doctrine laid down by Lord Haldane in *Bonanza Creek Gold Mining Co.* v. *Rex*§ that " executive power is in many situations that arise under the statutory constitution of Canada

* Read Para. 6 of the Explanatory Memorandum appended to the Government of India Bill, 1935, by His Majesty's Government.

† Proviso to s. 2 (1). For definition of the " Crown Representative " read the General Clauses Act (Act X) of 1897 as amended by Order in Council in 1937.

‡ Almost similar provisions have been made by Part XIII, s. 313 (Transitional Provisions), which will apply during the period elapsing between the commencement of Part III of the Act and the establishment of the Federation.

§ 1 A.C. 566 (1916).

conferred by implication in the grant of legislative power " is generally applicable to the Indian Federation, certain special provisions have also been made to meet difficulties and to make the system conform to Indian conditions The first difficulty arises from the triple enumeration of powers, namely, (i) the Federal Legislative List, (ii) the Provincial Legislative List, and (iii) the Concurrent Legislative List The general principle is that the executive authority of the Federation extends to the matters with respect to which the Federal Legislature has power to make laws* whereas the executive authority of each Province extends to the matters with respect to which the Legislature of the Province has power to make laws † In a Federated State, however, the executive authority of the Ruler shall continue to apply even in respect of matters as regards which the Federal Legislature has power to make laws except in so far as the Federal executive authority becomes exercisable in the State to the exclusion of the Ruler s authority by virtue of a Federal law

But the phrase " subject to the provisions of this Act " used in both the relevant sections (ss 8 and 49) suggests that a

* s 8 (1) (a)

† s 49 (2) Despite the fact that the executive authority of a Province extends to excluded and partially excluded areas within its own territory an Act of the Federal *Legislature or of the Provincial Legislature concerned does not by its own force extend* to those areas unless the Governor by public notification so directs And in giving such a direction with respect to any Act the Governor may direct that the Act shall in its application to the area or to any specified part thereof have effect subject to such exceptions or modifications as he thinks fit [s 92 (1)] The Governor may also make regulations for the *peace and good government* of any area in a Province which is for the time being an excluded area or a partially excluded area and any *regulations* so made may repeal or amend any Act of the Federal Legislature or of the Provincial Legislature or any existing Indian law which is for the time being applicable to the area in question *Regulations* made in this behalf shall be submitted forthwith to the Governor General and *until* assented to by him in his discretion shall have no effect The provisions as regards the power of His Majesty to disallow Acts shall apply in relation to any such *regulations* assented to by the Governor General as they apply in relation to Acts of a Provincial Legislature assented to by him [s 92 (2)] As respects any area in a Province which is for the time being an excluded area the Governor shall exercise his functions *in his discretion* [s 92 (3)] It seems to follow that so far as the areas in a Province which are for the time being *partially excluded areas are concerned the Governor* is to act on the advice of his responsible Ministers in the exercise of his functions subject to the provisions of s 52 (1) (a) (b) and (e) under which he is required to act *in his individual judgment* Read s 91 and the relevant Order in Council respectively for definition of the expressions excluded area and partially excluded area and for a complete list of such areas in different Provinces

departure from the general principle may be made in certain cases. For example, the Governor-General may, with the consent of the Government of a Province or the Ruler of a Federated State, entrust either conditionally or unconditionally to that Government or Ruler, or to their respective officers, functions in relation to any matter to which the executive authority of the Federation extends,* a provision of which use has already been made by the authority concerned. This is delegation by the Centre of its *executive authority* in certain cases to the units.

By sub-section (2) of s. 124 again the Federal Legislature by Act may, notwithstanding that it relates to a matter† with respect to which a Provincial Legislature has no power to make laws, *confer powers* or *impose duties* upon *a Province* or officers and authorities thereof. In this matter, unlike in the delegation of executive authority by the Governor-General under sub-section (1), the consent of the Provinces is not required. In view of the language employed it may be argued that the Federal Legislature is competent not only to confer by Act executive power on the Provinces but also delegate to them legislative authority in respect of matters which under the Act belong to the Federal sphere of legislation, although it has been construed as referring merely to " the utilisation of the administrative machinery of the units for the enforcement of a Federal law."‡ The latter interpretation derives support from the chapter heading as compared with the heading of the preceding Part. The whole chapter deals with the " administrative relations between Federation, Provinces and States " while the preceding Part refers to " legislative powers " and their " distribution." On the other hand, it is possible to argue that a distinction has been made by the framers of the Act between " the Government of a Province " as used in sub-section (1) and " a Province " as used in sub-section (2) and that the latter expression includes not only the executive authority in a Province but its legislative competence also. Nor apparently is the term "powers" employed in the sub-section restricted only to the

* s. 124 (1). " The Governor-General " used in the section means *constitutionally* the Governor-General acting on the advice of his Ministers as opposed to the Governor-General acting in his discretion or in the exercise of his individual judgment.

† Subjects enumerated in List I of the Seventh Schedule.

‡ N. Raja Gopala Ayyangar : *The Government of India Act, 1935*, p. 159.

executive powers In any case the phrasing of the section is likely to provoke conflicts

S 126 provides for Federal executive control over the Provinces in certain cases The executive authority of every Province shall be so exercised as not to impede or prejudice the exercise of the executive authority of the Federation, and the executive authority of the Federation shall extend to the giving of such directions to a Province as may appear to the Federal Government to be necessary for that purpose * This refers to directions in respect of matters within the competence of the Federal Legislature under s 100 (1) whereas sub-section (2) refers to the giving of directions by the Centre to a Province for carrying into execution of any Central Act relating to a matter specified in Part II of the Concurrent Legislative List with respect to which both the Federal Legislature and a Provincial Legislature have power to make laws † It follows that the directions contemplated in the sub-section do not apply to Part I of the Concurrent Legislative List Part I of the Concurrent List empowers the Federal Legislature to legislate whereas by Part II not only is that Legislature authorised to enact legislation but the Federal Government are competent to direct a Province in the matter of executing a Federal law on the subject which authorises the giving of such directions

Federal executive control over Provinces

The Federal executive authority extends also to the giving of directions to a Province as to the construction and maintenance of means of communication declared in the direction or directions to be of military importance,‡ but this must not be construed as restricting the power of the Federation to construct and maintain means of com-

* s 126 (1) A new section (s 126A) is proposed to be added to the Government of India Act 1935 by an Amending Bill It is as follows Where a proclamation of emergency is in operation whereby the Governor General has declared that the security of India is threatened in any way (a) the executive authority of the Federation shall extend to the giving of directions to a Province as to the manner in which the executive authority thereof is to be exercised (b) any power of the Federal Legislature to make laws for a Province with respect to any matter shall include power to make laws as respects that matter notwithstanding that it is one with respect to which the Provincial Legislature also has power to make laws The amendment is to be read with ss 102 and 126 of the Act for proper understanding of its scope and implications It is however an emergency provision designed to meet a war situation

† s 100 (2) ‡ s 126 (3)

munication as part of its functions with respect to naval, military and air force works.* These directions are as a normal rule to be given by the Federal Government, but if it appears to the Governor-General that they have not been given effect to in any Province, the Governor-General, acting in his discretion, is competent to issue as orders to the relevant Governor those directions previously given or those directions modified in such manner as the Governor-General thinks proper.†

Apart from these powers and without prejudice to them, the Governor-General, again acting in his discretion, may at any time issue orders to the Governor of a Province as to the manner in which the executive authority of that Province is to be exercised for the purpose of preventing any grave menace to the peace or tranquillity of India or of any part thereof.‡ It may be recalled that power was taken by the Governor-General early in February, 1938, to issue orders to the Governors of Bihar and the United Provinces directing them not to accede to the demand of their respective Ministers for a general political amnesty. Governors are empowered under s. 52 (1) (*g*) of the Government of India Act, 1935, in exercise of their "special responsibilities," to secure the execution of orders or directions lawfully issued to them under Part VI of the Act by the Governor-General in his discretion. In carrying out their duties in this behalf Governors are required to exercise their "individual judgment"§ so that the advice of Ministers may be overruled.

The second difficulty arises from the fact that the Federal "units" includes the Governors' Provinces, the Federated States and the Chief Commissioners' Provinces. Special provision has been made for the Federated States by s. 8 (2), and the mere fact of accession to the Federation by Instrument in regard to a subject does not empower the executive authority of the Federation to exercise its power within the territory of a Federated State. Competent Federal legislation must authorise the exercise of such power. The Federal executive authority extends to all the Chief Commissioners' Provinces|| as enumerated in s. 94 (1), but certain

* Proviso to s. 126 (3).
† s. 126 (4).
‡ s. 126 (5).
§ s. 52 (3).
|| s. 94 (3) read with s. 95 (2).

special provisions as to Federal legislative competence in British Beluchistan have been made *

Princes in the Federal system concessions to them

It is to be noted that the condition precedent to the setting up of the Federation as laid down in the Act† has encouraged in non-British India the hope of surrender on the part of the British Government to unreasonable demands of the Princes "The essence of this project," as Professor Keith puts it, "is to place on a completely new basis the relations of the States and the Crown by obtaining from the Crown, in consideration of accession to the Federation, the reaffirmation of existing treaties and agreements "‡ By long usage the Crown has claimed and exercised the right to intervene in the affairs of States in certain circumstances despite the treaties, agreements or *sanads* In recent years the doctrine of paramountcy has been asserted in Alwar, Kashmir, Indore, in Lord Reading's letter to His Exalted Highness the Nizam of Hyderabad and Lord Linlithgow's intervention in the Rajkot issue There is, by the way, little substance in the contention that paramountcy is the symbol of a special prerogative and that it can neither be affected by legislation nor transferred For the whole course of evolution of English law as well as the practices that have grown up definitely point to a contrary doctrine The prerogative exists in so far as it is not destroyed by statute, nor is there anything preventing the Crown from delegating it And except in some specified cases§ the prerogative is exercised on the advice of the Crown's responsible advisers

Under the scheme now envisaged the Princes expect to secure a juridical background for the treaties, engagements or *sanads* so that the intervention by the Crown by executive action may be ousted Should the necessary Accession take place it is not unlikely that the Princes would insist on inter-Imperial arbitration on points of dispute between them and the Crown or even would go so far as to demand construction of the treaties, etc, by an International Court of Justice Professor Keith

* s 95 (2) and (3)

† s 6

‡ Keith *Letters on Imperial Relations* etc p 302

§ The rule of Ministerial responsibility does not seem to apply to the Royal Victorian Order and the Order of Merit

does not seem to be far wrong in suggesting that they will resist attempts by His Majesty's Government "to establish some semblance of the rule of law and representative government in their territories,"* although at the present moment the Princes do not in theory or practice enjoy any immunity from intervention in this regard by the Crown. It seems that the Paramount Power is aware of the difficulty. There is evidence that pressure is being put on the Princes to introduce some sort of popular government and the rule of law before the inauguration of Federation. Again the rule is that no Federal law shall apply and extend to a Federated State in respect of a matter which is not accepted in that State's Instrument of Accession.† Of course it is understood that the Crown will have power, as in theory it has power in such matters, to refuse its assent to a particular Instrument of Accession under which a State may agree to transfer powers to the Centre,‡ but obviously the State concerned has complete liberty in such a case not to accede to the Federation at all.§ Another significant fact is that the Act contemplates a variety of Instruments of Accession so that one State may accede less than another thereby introducing a further complication into the scheme of Federation. The ideal aimed at, however, is the greatest possible measure of uniformity, but the ideal may very well afford to remain at a distance from the real. These are some of the disquieting features of the Federal plan of the 1935 Act. The project, therefore, is more than a generous concession to the Princes; it is in some respects a gift to them.

The other side of the shield.

The sections bearing on the States, particularly the amendments to the provisions of the original Bill made in response to the Princes' insistent demand thus leave them with much more power than a normal type of Federation would in ordinary circumstances permit. But, on the other hand, despite the safeguards provided for them,|| the Princes ought to remember that

* Keith : *Letters on Imperial Relations*. etc., p. 352.
† ss. 99 (2) and 101.
‡ s. 6.
§ ss. 5-6.
|| s. 101.

once they have acceded to and entered the Federation they will have to part with a considerable measure of their internal sovereignty hitherto exercised by them What is at present missing from the Act will perhaps be discovered in the course of time and as a result of conscious or unconscious developments under the operation of Federal forces

The opinion expressed by Professor J H Morgan, a well-known authority on constitutional law, who was engaged by the Princes to give them advice, is significant He called attention to the clause inserted in the Act that " there shall be united in a Federation under the Crown "* and remarked that although the word " indissoluble " was nowhere used in the Act as in the preamble to the Australian Commonwealth Act, the Indian union would be construed as being as " indissoluble " as that of the Australian States The Federated States under the plan, therefore would have no right of secession, and secession might be possible only when the Houses of Parliament of their own accord or at the request of the States concerned amend the Act to that effect or by an act of revolt But such amendment would negative the pledge of Dominion status given to British India by British statesmen, though not incorporated in the Act

Sir Tej Bahadur Sapru, however, takes a contrary view Apparently laying stress on s 6 (1) (*a*) he says that a Ruler ' federates " not because the Act requires him to do so but because he chooses to accede to Federation Should, therefore, the terms of a Ruler's Instrument of Accession, he argues, be violated by any Federal authority, his undertaking would go and he might secede from the Federation The issue is not without difficulty, for the interpretation of any Instrument of Accession does not rest with the Ruler concerned Again Professor Morgan holds that even if an Instrument is treated as a Treaty in the sense accorded to international agreements which is extremely doubtful, the text of the Instrument must be construed as it stands and that what was said or done in the negotiations preceding accession to the Federation in any particular case must be held to be inadmissible as evidence of the intention of the parties on the general English

* s 5 (1) Read Professor Morgan s Tagore Law Lectures delivered in March, 1939, before the University of Calcutta

rule of construction that discussions, negotiations or statements concerning a statute are no guidance for courts if the language of the statute is clear and beyond any doubt. Nor is the Instrument of Instructions to the Governor-General an effective safeguard, for it is not enforceable in a court of law; and the silent operation of constitutional usage is likely to nullify the protection of the Instrument of Instructions. Besides, in a case of conflict the statute must be held to supersede the Instrument to the extent of repugnancy. Sir Tej Bahadur Sapru's reliance on that document as an instrument of protection is rather much too optimistic.

Professor Morgan then argues, in our judgment quite properly, that to legislate for a Federated State is to legislate for the subjects of that State and that it does not matter whether the subjects are mentioned as coming within the scope of Federal legislative competence or not.* There can be no question that the power to legislate for "British India" means power to legislate for all His Majesty's subjects in British India and indeed for anybody else including any State subject resident or domiciled therein. It is suggested that the allegiance of the States subjects would be divided between the Rulers and the Federation.

The protection for the executive authority of the State, as contemplated in sub-section (2) of s. 8, may be negatived by the operation of constitutional principles or it may affect the basic structure of responsible government in British India. If the States are allowed to reserve to themselves the executive power even in the Federal sphere of legislation in the absence of a specific Federal law, the Federal executive would be shorn of their responsibility to the legislature so far as the Federated States are concerned. A serious conflict is inevitable between British India and the Federated States under the scheme adumbrated in the Act; and it is not surprising that there should be lack of enthusiasm on the part of both to enter the Federal box.

It has further been argued that the enforcement of Federal obligations on the part of a Federated State is

* The subjects of the Federated States are specifically mentioned in s. 99 (2) and (3) as coming within the scope of Federal legislation *wherever they may be*. This section refers to the extra-territorial effect of Federal legislation in certain cases.

to be confined to the Governor-General on behalf of the Crown in exercise of its paramountcy and that the jurisdiction of the responsible executive at the Centre even in respect of matters covered by an Instrument of Accession has been ousted. There seems to be no support for such a view, and nowhere has it been indicated in the relevant sections* that the Federal executive authority can operate only through the Governor-General in exercise of the Crown's paramountcy. What the law provides in regard to a Province or the Centre is that the executive authority is to be exercised on behalf of His Majesty by the Governor or the Governor-General, as the case may be, either directly or through officers subordinate to him † In constitutional practice that provision is rather *pro forma* than substantial save in those cases in which the Governor-General or the Governor is required to act " in his discretion " or " in the exercise of his individual judgment."‡ Even in those cases the accretion of power to the Ministers at the Centre or in a Province by steady growth of Ministerial responsibility may in actual practice render the reserve powers of the Governor-General or the Governor obsolescent.

The Crown's paramountcy, that is to say, powers connected with the exercise of the functions of the Crown in its relations with Indian States shall in India, if not exercised by His Majesty, be exercised only by His Majesty's Representative appointed for the purposes or by persons acting under his authority.§ The functions of the Governor-General and the Representative of the Crown are distinct and separate.‖ The offices also are different, although His Majesty is competent to appoint one person to fill the two offices ¶

* ss 7 and 8

† ss 7 and 49

‡ Adaptations of the *General Clauses Act*, 1897 (X of 1897), in Schedule I to the Government of India (Adaptation of Indian Laws) Order, 1937.

§ Proviso to s 2 (1)

‖ s 3 read with s 7

¶ s 3 (3) Read Para I of the *Commission*, dated the 8th March, 1937, issued under the Royal Sign Manual and Signet appointing Lord Linlithgow Governor-General of India and Crown's Representatives So long as an incumbent will hold the two offices, he will, while in India, bear, in addition to the styles and titles of the said offices, the style and title of His Majesty's " Viceroy " (Para, II of the *Commission*).

Three categories of subjects under the Act.

According to the scheme incorporated in the Act* there are, as has already been stated, three categories of subjects, namely, (I) the Federal Legislative List, in which the Federal Legislature has, and a Provincial Legislature has not, power to make laws;† (II) the Provincial Legislative List in which a Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof‡ and (III) the Concurrent Legislative List in which the Federal Legislature, and subject to sub-section (1) of s. 100, a Provincial Legislature also, have power to make laws.§ There is in the Act no list of subjects which should belong to the States and no such list is necessary, for it is clear that they will continue to make laws in respect of all matters which by their Instruments of Accession they do not hand over to the Federal authorities.‖ The States individually or collectively can by their Instruments restrict the Federal legislative field within their territories so that under the Act while the Federal jurisdiction will apply to the Provinces in respect of the subjects enumerated in List I of the Seventh Schedule, the number may be reduced to a considerable extent in the case of an individual State or the entire body of the Federated States. The only safeguard against the Princely curtailment of the Federal field lies in the power reserved to His Majesty to accept or reject an Instrument of Accession.¶ Except, therefore, in the case of Rulers, who, in our judgment, have been given much more power than is warranted in a truly federal plan, there is not much in the division of subjects which on principle may be held to be objectionable or unscientific.

Conflicts of jurisdiction.

But that does not mean that it will not at all give rise to conflicts of jurisdiction. Even Sir Samuel Hoare admitted in the course of the Commons Committee debates in May, 1935, that despite

* s. 100.

† List I of the Seventh Schedule to the Act.

‡ List II of the said Schedule.

§ List III (Part I and Part II) of the said Schedule.

‖ s. 101.

¶ s. 6 (4).

the exhaustive classification of subjects in the relevant Schedule there was "the possibility of increased litigation" The purpose underlying the classification of subjects into three Lists, as exhaustive as one could make it, was to reconcile Hindu and Moslem points of view The Hindus wanted to reserve residuary power at the Centre while the Moslems demanded it for the Provinces The scheme has been so planned as Sir Samuel Hoare made it clear, "as to leave little or nothing for the residuary field"* It is, however, beyond the power of even most far-seeing statesmen to anticipate circumstances in all their details which may arise from time to time in the governance of a land, and it may be recalled that the statutory division of subjects in some Federal Constitutions, with which we have dealt, has produced costly and sometimes ruinous litigation and brought in its train important and unexpected developments frustrating as they have done in many respects the intentions of their original framers

In view of the ever-increasing importance of complex economic, financial and industrial problems and wide extensions of the spheres of public activity in modern times, a great difficulty in the matter of jurisdiction is likely to arise in India as it has arisen in other countries from the exercise of powers relating to trade, commerce and industry In India subjects dealing with the protection of minorities as well as those bearing upon the coercive power of the State and the maintenance of law and order might bring the Federal authorities and the Provinces in conflict with each other or the Provinces in conflict with one another There was, therefore, great need for caution and circumspection in the distribution of powers

Federal control in certain cases

The framers of the India Act, be it noted, have done well in anticipating the difficulties that might arise in connection with the regulation of communications as is clear from the restrictions they have imposed upon the power of the Provinces in this behalf It is provided that the Provinces will have no power to control major

* Commons Committee Debates May 1935

railways* and inland waterways in so far as the latter constitute natural sources of intercourse or communication between one unit and another.† The same intelligent anticipation is discernible also in the provision for Federal control of industries where such control is declared by Federal law to be expedient in public interest.‡

There are subjects statutorily belonging to the Provinces which might require Inter-Provincial co-ordination. The problem of tackling the water-hyacinth pest which is working havoc in Bengal and parts of Bihar and Orissa and Assam, economic planning, schemes of restriction of jute or any other agricultural commodity, institutions of research in the spheres of health, forestry and agriculture and such other subjects may be mentioned in this connection. Reference may here be made to the provision§ which has been made for the constitution by Order in Council of an Inter-Provincial Council if at any time it appears to His Majesty upon consideration of representations addressed to him by the Governor-General that the public interests would be served by the establishment of such a Council.

Inter-Provincial Councils.

A Council so established may be charged with the duty of (*a*) inquiring into and advising upon disputes which may have arisen between Provinces, (*b*) investigating and discussing subjects in which some or all of the Provinces, or the Federation and one or more of the Provinces, have a common interest, or (*c*) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject. It is not to be supposed that by s. 103, which empowers the Federal Legislature to legislate as to a Provincial subject under certain conditions, can functions and powers be assigned to an Inter-

* "Railway" includes a tramway not wholly within a municipal area. "Federal railway" does not include an Indian State railway but, save as aforesaid, includes any railway not being a minor railway. "Minor railway" means a railway which is wholly situate in one unit and does not form a continuous line of communication with a Federal railway, whether of the same gauge or not [s. 311 (2)].

† Item No. 18 of List II, Item No. 20 of List I and Item No. 32 of List III of the Seventh Schedule.

‡ Item No. 34 of List I of the Seventh Schedule.

§ s. 135.

Provincial Council as contemplated in s. 135. For the Order in Council setting up such a Council will itself "define the nature of the duties to be performed by it and its organisation and procedure"

But ss 103 and 135 should be read together as indicating to what extent and in what manner co-ordination may be secured These sections may solve in India the legal difficulty that arose in Canada as a result of the decision in the *City of Montreal v Montreal Street Railway Co.** in which the Privy Council held that the Dominion Parliament could not trench upon the powers of the Provinces merely on the ground of inconvenience of Provincial administration in a matter which might concern more than one Province Action under s 103 may be taken only if the Chambers of the Provincial Legislature concerned pass resolutions desiring that any Provincial matter or matters should be regulated in that Province by Act of the Federal Legislature Any such Act may, as respects any Province to which it applies, be amended or repealed by an Act of the Legislature of that Province Full advantage may in the years to come be taken of this provision by the Provinces

Provisions as to International agreements

Provisions of s 106 as to legislation for giving effect to international agreements were an anticipation, as it were, of the famous decision of Lord Atkin in *Attorney-General for Canada v Attorney-General for Ontario*† in which it was held that if a treaty or convention entered into by the Dominion of Canada did not fall within the scope of s 132 of the British North America Act, the Dominion Parliament was not competent to disturb the distribution of powers under ss 91 and 92 merely in exercise of the general power conferred by s 132 ‡ In British jurisprudence the rule is that while a treaty is an executive act, the performance of the obligations arising therefrom requires legislative sanction if it involves alteration of the existing municipal law The terms of a treaty do not, by virtue of the treaty alone, have the force of law within the British Empire § That being so, the

* A C 333 (1912)

† A C 326 (1937)

‡ See pp 669 75 *supra*

§ A C 326 (1937) *Walker v Baird* A C 491 (1892)

question arises in a Federal system as to whether or not the power to negotiate or enter into treaties conferred upon the Centre carries with it power to legislate as to subjects assigned to the units for the purpose of implementing a treaty. Lord Atkin's answer, which has already been quoted, seems to offer no solution especially in those cases, as in Canada, where there is no legal machinery to secure co-operation between the Centre and the units and to implement a treaty.

The position not absolutely free from uncertainty.

S. 106 of the present Government of India Act seeks to remove the legal and constitutional difficulty which has manifested itself in the Canadian Dominion. It will be seen that "the implementing of treaties and agreements with other countries" belongs to the Federal Legislative List.* What s. 106 provides is that the *mere* entry of the subject in the Federal Legislative List does not empower the Federal Legislature to legislate for a Province save with the previous consent of the Governor which means *constitutionally*, if not *legally*, the Governor acting on the advice of his Ministers. In other words, the Federal Legislature is competent to legislate for the purpose of implementing treaties and agreements with other countries provided the subject matter falls either within the Federal Legislative List or the Concurrent Legislative List; and when the subject matter legislated upon belongs to the Provincial Legislative List, Federal legislation is invalid to the extent that it has not had the previous consent of the Governor. The same restriction applies in the case of a Federated State. There is no remedy against those Provinces or States which refuse to accord the previous consent contemplated in sub-section (1) of s. 106. So much of any law as is valid only by virtue of the general Federal entry relating to the "implementing of treaties and agreements with other countries" may be repealed by the Federal Legislature and may, on the treaty or agreement in question ceasing to have effect, be repealed as respects any Province by a law of that Province and, as respects a State, by a law of that State.†

* Item No. 3 of List I of the Seventh Schedule.
† s. 106 (2).

The Federal Legislature is competent under the Act to legislate for a Province on proclamation of emergency by the Governor-General in his "discretion" in respect of any of the matters enumerated in the Provincial List of subjects.* But the procedure is somewhat cumbrous and may prove dilatory and, therefore, ineffective In the first place, the proclamation must be issued by the Governor-General in his discretion to the effect that a grave emergency has arisen whereby the security of the country is threatened by "war" or "internal disturbance" before any action may be taken by the Federal Legislature. Secondly, no Bill can be introduced or moved without the previous sanction of the Governor-General—a procedure no less drastic than reservation—and the obligation is imposed upon him to refuse sanction unless it appears to him that the provision proposed to be made is warranted by the nature of the emergency †

Besides, "war as contemplated in the proclamation is understandable, but not so is the expression " internal disturbance " It may mean many things, and it is submitted that it will include 'disturbances' arising from communal clashes or of communal legislation designed deliberately to deprive a minority or minorities of their legitimate rights It was suggested by the Joint Parliamentary Committee that the term " internal disturbance should be defined in terms which would ensure that for this purpose it must be comparable in gravity to the repelling of external aggression ‡ But unfortunately no definition has been inserted in the Act leaving more than a necessary measure of discretion to the Governor-General An attempt has, however, been made by Parliament to remove the confusion by means of an amending Bill

The effect of a Proclamation of emergency under s 102

A proclamation of emergency, which may be revoked by a subsequent proclamation, shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament and shall cease to operate at the expiration of six months, unless before the ex-

* s 102 (1)
† Proviso to s 102 (1)
‡ J P C Report, Paragraph 238

piration of that period it has been approved by resolutions of both Houses of Parliament.* A law enacted by the Federal Legislature on proclamation of emergency under this section shall cease to have effect on the expiration of a period of six months after the proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.† The provision as to the duration of the effect of the law is obnoxious to the general rule of construction, where there is no specific statutory provision to the contrary, that offences committed in terms of emergency Acts must be proceeded against and punished before the law expires and that as soon as it expires any proceedings *ipso facto* terminate. That rule is superseded by the saving clause in sub-section (4) of s. 102 so that proceedings may be initiated after the termination of the Act in question in respect of a right which has already accrued or a liability already incurred.

The section does not destroy the Federal scheme as such. It does not, that is, affect the power of a Provincial Legislature to legislate in respect of matters enumerated in the Provincial Legislative List. All that it provides is that if any provision of a Provincial law is repugnant to any provision of a Federal law enacted under it, the Federal law, whether passed before or after the Provincial law, shall prevail, and the Provincial law shall, to the extent of the repugnancy, but so long as the Federal law continues to have effect, be void.‡

Judicial interpretation in Canadian cases.

No such extraordinary power of Federal invasion of Provincial or State spheres of legislation has by statute been given to the Canadian Dominion or the Australian Commonwealth, but the rule enshrined in the India Act was recognised in a series of Privy Council judgments in Canadian appeals such as *Attorney-General for Ontario* v. *Attorney-General for Canada,*§ *Fort Frances Pulp and Paper Co.* v. *Manitoba Free Press,*|| *In re the Board*

* s. 102 (3).
† s. 102 (4).
‡ s. 102 (2).
§ A.C. 348 (1896).
|| A.C. 695 (1923).

of Commerce Act,* and *Attorney-General for Canada* v *Attorney-General for Ontario* † The same view was taken also by the Dominion Supreme Court ‡ The doctrine enunciated in these decisions is that the Dominion is competent in *abnormal circumstances* to trench upon the powers of the Provinces in exercise of its general power But in *Russell* v *The Queen*§ it was held that Dominion legislation was in order, even in times of peace, in respect of subjects which concerned the Dominion generally provided that they were not withheld from the powers of the Dominion Parliament to legislate, "by any of the express heads in s 92 It appears that in order to avoid conflicts of judicial interpretation and remove doubts as to the power of the Centre Parliament has deliberately inserted s 102 (2) of the Government of India Act, 1935

Repugnancy in the Concurrent List

There are certain points which arise in connection with the Concurrent List The powers of the Federal Legislature in respect of matters enumerated in this List are not controlled by the provisions dealing with the Provincial List whereas the powers of a Provincial Legislature in regard to those matters are to be exercised subject to the provisions dealing with the Federal List In other words if there is any conflict between the Federal List and the Concurrent List, the competence of a Provincial Legislature is, to the extent of conflict, ousted even in any matter of the concurrent field On the other hand, if there is any repugnancy between the Concurrent List and the Provincial List, the subject matter in question is to be construed as coming within the purview of the concurrent sphere so that the Federal Legislature comes to enjoy powers concurrently with a Provincial Legislature Thus the centripetal bias of the Indian Constitution is emphasised

Practically the same rule is applicable to the provisions dealing with the Provincial List The powers of a Provincial Legislature to legislate as to matters set out in that List are to be read subject to the provisions which confer powers on the

* 1 A C 191 (1922)
† A C 326 (1937)
‡ 3 D L R 622 (1936)
§ 7 App Cas 829 (1882)

Federal Legislature by virtue of the entries in the Federal List and the Concurrent List. In the case of conflicts between the entries in the Federal List and the Provincial List the former supersedes the latter to the extent of repugnancy.*

The results in both the cases follow from the use in s. 100 (1) (which deals with Federal legislative competence) of the expression "*notwithstanding anything in the two next succeeding sub-sections;*" in s. 100 (2) (which deals with the concurrent spheres of legislation) of the expression "*notwithstanding anything in the next succeeding sub-section*" with reference to the powers of the Federal Legislature, and of the expression "*subject to the preceding sub-section*" with reference to the powers of a Provincial Legislature; and in s. 100 (3) (which deals with Provincial legislative competence) of the expression "*subject to the two preceding* sub-sections."

No repugnancy where the field is clear.

But where the field is clear and where there is no conflict the Federal Legislature cannot trench upon any of the subjects mentioned in the Provincial List. There may, however, be cases of overlapping in legislation where the field is clear, and in such cases neither Federal nor Provincial legislation is *ultra vires* merely on the ground of overlapping, unless there is conflict.† The rule laid down in *G. W. Saddlery* v. *The King*,‡ namely, that "within the sphere allotted to them by the Act the Dominion and the Provinces are rendered in general principle co-ordinate Governments," applies also to the Indian Federation so that the Centre "cannot by purporting to act in a field committed to it appropriate to itself exclusively a field of jurisdiction in which apart from such a jurisdiction it could exert no legal authority."§ Similarly a Province cannot under colour of legislating as to a subject within its jurisdiction invade the Federal field.‖ As was held by the Judicial

* Read s. 91 of the British North America Act; *Tennant* v. *Union Bank of Canada*, A.C 31 (1894).

† *Grand Trunk Ry. Co.* v. *Attorney-General for Canada*, A.C. 65 (1907).

‡ 2 A.C. 91 (1921).

§ *Attorney-General for Ontario* v. *Reciprocal Insurers*, A.C. 328 (1924).

‖ *John Deere Plow Co.* v. *Wharton*, A.C. 330 (1915).

Committee in Canadian cases,* where there was an apparent conflict it was the duty of the courts, however difficult it might be, to ascertain in what measure, and to what extent, authority to deal with matters specified in the Lists exists in each legislature, and to define in a given case the limits of their respective powers It could not have been the intention of the framers of a Constitution Act that a conflict should exist The lists must be read together so as to reconcile the powers In other words, the design of a Constitution Act must not be frustrated by judicial interpretation

Statutory safeguards against conflicting laws

As for the Concurrent List proper, s 107 deals with cases in which there is repugnancy between a Federal law and a Provincial or State law *Mutatis mutandis* it practically reproduces s 109 of the Commonwealth of Australia Act which has already been quoted There is one important point of difference between the provision of the Indian law and that of the Australian law That point is brought out in sub-section (2) of s 107 of the India Act which provides that where a Provincial law as regards any matter in the Concurrent List is repugnant to an *earlier* Federal law or *an existing Indian law* with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General† or for the signification of His Majesty's pleasure,‡ has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail

In exercising his function in this regard the Governor-General has been directed, "while giving full consideration to the proposals of a Provincial Legislature, to have due regard to the importance of preserving substantially unimpaired the uniformity of law which the Indian Codes have hitherto embodied "§ This is one safeguard against conflicting laws in different Provinces as to the same subject in the Concurrent List There is another, and it is that the Federal

* *The Citizens Insurance Co of Canada* v *William Parsons The Queen Insurance Co of Canada* v *William Parsons* (1881) 7 App Cas 96

† s 75

‡ s 76

§ Cl XII of the *Instrument of Instructions* issued to the Governor General on the 8th March 1937

Legislature may at any time enact further legislation with respect to the same matter provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been reserved, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.*

Subject to these restrictions, if any provision of a Provincial law is repugnant† to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an *existing Indian law*‡ with respect to any matter within the scope of the concurrent field, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail, and the Provincial law shall, to the extent of repugnancy, be void. The same provision is made with regard to the competence of a State law except that a Federal law which extends to the State concerned and not an *existing Indian law* supersedes a State law to the extent of repugnancy.§ It has been held in the United States that when a State statute and a Federal statute operate upon the same subject matter and make contrary or conflicting provisions concerning it, and when the Federal statute is within the competence of the Federal Legislature, then the State statute must give way.||

Provisions of the Bengal Tenancy Ordinance, 1938.

Attention may here be called to an Ordinance called the Bengal Tenancy Ordinance, 1938, promulgated by the Governor of Bengal under s. 88 (1) of the Government of

* The giving of previous sanction shall not be construed as precluding the Governor-General or the Governor, as the case may be, from exercising subsequently in regard to any Bill in question any powers conferred upon him by the Act with respect to the withholding of assent to, or the reservation of, Bills [s. 109 (1)]. Nor shall an Act or any provision thereof be invalid by reason only that the previous sanction was not given, if assent to that Act was given by the relevant authority [s. 109 (2)].

† For "repugnant" read *Attorney-General for Queensland* v. *Attorney-General for Commonwealth*, 20 C.L.R. 148. It includes "inconsistent with" as used in the Australian Act.

‡ s. 107 (1).

§ s. 107 (3).

|| *Golf, Colorado, and Santa Fe R. Co.* v. *Hefley*, 158 U.S. 98.

India Act, 1935.* It provided *inter alia* that notwithstanding anything contained in any other law the period during which the Ordinance remained in force must not, in relation to the registration of instruments of transfer to which s. 26C (2) of the Bengal Tenancy Act, 1885, applied, be taken into consideration in computing any period prescribed by or under any law within which a document had to be presented for registration.† It purported to repeal s. 23 of the Indian Registration Act, 1908, which lays down that subject to certain provisions of the Act no document other than a will shall be accepted for registration unless presented for that purpose to the proper officer within four months from the date of its execution. The Registration Act is a Central statute and is an "existing Indian law" in terms of s. 311 (2) of the Government of India Act, 1935, and the subject matter is one which comes under the Concurrent List.‡

In so far, therefore, as the Ordinance was inconsistent with or repugnant to the provisions of the Registration Act it seemed to be invalid under sub-section (3) of s. 88 read with sub-section (1) of s. 107 of the India Act. It is true that the Governor-General's instructions as contemplated under s. 88 (1) had been obtained in regard to the Ordinance, but these instructions were no corrective inasmuch as they were not to be construed as validating a Governor's Ordinance under the section with respect to a matter as regards which a Provincial law would be void in terms of the India Act. For the Act lays down that "if and so far as an Ordinance under this section§ makes any provision which would not be valid if enacted in an Act of the Provincial Legislature assented to by the Governor, it shall be void."‖ Nor has the procedure of sub-section (2) of s. 107 been applied in this connection to validate the Ordinance. It seems to follow, therefore, that the transactions or instruments sought to be covered by the Ordinance are not protected in law.

* *The Calcutta Gazette Extraordinary*, dated the 3rd June, 1938.
† s. 2.
‡ Item No. 8 of Part I of List III of the Seventh Schedule.
§ s. 88.
‖ s. 88 (3).

Doubts as to the location of jurisdiction: a reference to the Federal Court.

Now there are obvious limitations to which any scheme of distribution of powers under a Federal system, however exhaustive and scientific, must be subject, and the scheme enshrined in the India Act of 1935 is not free from those limitations. Doubts as to the location of jurisdiction have already arisen in certain cases. For example, a reference was made by the Governor-General in his discretion under s. 213 to the Federal Court as regards the validity or otherwise of what is known as the Central Provinces and Berar Sales (Retail) of Motor Spirits and Lubricants Taxation Act, 1938. The Central Government thought that the Act encroached upon " excise " which fell within the exclusive jurisdiction of the Federal Legislature* as specified in the Seventh Schedule and was, therefore, *ultra vires* whereas the Central Provinces Government evidently relied on entry No. 48 of List II read with s. 311 (2).† The Court has unanimuosly held that the Act is *intra vires* of the legislature of the Central Provinces and Berar.

Quoting with approval from the Oxford Dictionary, Gwyer, C. J., observed that " excise " was a " duty charged on home goods, either in the process of their manufacture or before their sale to the home consumers " and that in the definition the words " before their sale to the home producers," were not necessarily a reference to retail sales and might equally be a reference to a sale by the producer or manufacturer to the wholesaler for general distribution to consumers. His lordship then pointed out that his interpretation reconciled the *apparent conflict* between the two entries in the Schedule without doing violence to the language of either. It would be strange indeed, added the Chief Justice, if the Centre had the exclusive power to tax retail sales, even if the tax were confined to goods produced or manufactured in India, when a Province had an exclusive right to make laws with respect to the trade and commerce within the Province,‡ and with respect to the production, supply and distribution of goods,§ within its boundaries. It might have been ap-

* Item No. 45 of List I.

† " Goods " includes all materials, commodities and articles.

‡ Item No. 27 of List II.

§ Item No. 29 of List II.

prehended that this method of taxation by the Provinces would tend to reduce the consumption of the taxed "goods" and thus indirectly diminish the Central excise revenue To that the Chief Justice's reply was that it was a point which it was not for the Court to take into consideration if there was neither ambiguity nor doubt as to the language of the provisions and, in his lordship's judgment, the interpretation of the Act was clear in this respect According to Mr Justice Sulaiman, it was not the intention of Parliament to give the Provinces a power and at the same time to render it an illusory power and unless at least retail sales came within the category "sales of goods" power to tax sales of home products under entry 48 in List II would be practically non-existent On reading together entries 48, 49 and 50 in List II, Mr Justice Jayakar held that Parliament had given and intended to give a Province power to levy taxes on the consumption of excisable goods within its boundaries even when such goods fell under entry 45 of List I

Apparently the Federal Court's "opinion" does not cover marginal cases where there may be considerable doubt as to whether a 'sales tax' is really an excise as contemplated in the Federal entry, and in such cases it is submitted that Federal legislative competence may be held to supersede Provincial competence in view of the language in which s 100 has been couched with reference to the jurisdiction respectively of the Federal Legislature and a Provincial Legislature *

Jurisdiction over Universities

Take again the jurisdiction as respects education and the Universities situate in British India Education is a Provincial subject† and it means education, general as well as technical, from the elementary courses to the University stage Two Universities, namely, the Benares Hindu University and the Aligarh Muslim University, have been specifically mentioned in the Act as coming within the Federal sphere ‡ The question is, having regard to entry 17 of List II read with entry 13 of List I, whether or no the other Universities belong to their respective

* Pp 728 729 *supra*

† Item No 17 of List II of the Seventh Schedule

‡ Item No 13 of List I of the Seventh Schedule

Provinces. The point is clear where the jurisdiction of a University is confined to one " unit " of the Federation, such, for instance, as the Dacca University in Bengal or the Lucknow University in the United Provinces. But the difficulty arises, as it has already arisen, with regard to Universities whose jurisdiction applies to more than one " unit " or, to put it more precisely, is not confined to one " unit."

The Patna University Amendment Bill.

The issue was discussed on the floor of the Central Legislative Assembly in connection with the Patna University Act (Amendment) Bill moved in October, 1937, on behalf of the Government.* The Bill sought to amend the relevant Adaptation Order, 1937, which had the effect of extending the jurisdiction of the Patna University to the whole of the new Province of Orissa. It proposed to retain the jurisdiction of that University over that part of the new Province which formerly belonged to Bihar and Orissa and extend the jurisdiction of the Andhra University to that part of Orissa which came from the Presidency of Madras. It was argued by the Opposition, particularly by Mr. Bhulabhai Desai and Mr. S. Satyamurti relying on entry 17 of List II read with entry 13 of List I, that the Centre had no legislative competence in regard to the matter. On the other hand, Sir Nripendranath Sircar, speaking for the Government, claimed jurisdiction relying on entry No. 33 of List I and the relevant Adaptation Order. According to that entry, to the Federal sphere belongs " corporations, that is to say, the incorporation, regulation and winding up of trading corporations, ...and of corporations, whether trading or not, *with objects not confined to one unit.*" The Adaptation Order in question substitutes " Central Government " for " Local Government " throughout the Act,† except where otherwise provided.

What is a " unit "?

It is admitted that the University concerned is a " corporation." It is also admitted that the " promotion of education " is one of its "objects." It is further a fact that its "objects" are not confined to one "unit" of the Federation. It is, therefore, difficult to see how

* Legislative Assembly Debates (*Official Report*), Vol. VII, No. 4, pp. 3065-76.
† The Patna University Act (Act XVI) of 1917.

the University of Patna and other Universities such as Calcutta University or Bombay University, whose objects are not confined to one "unit," do not come under the Centre Mr. Desai pointed out that " if it was present to the mind of those who legislated in support of the powers of this Legislature (the Central Legislature) not merely over these two main Universities (Benares and Aligarh) but all Universities, which had jurisdiction over more than one Province, the appropriate place was item 13 (List I) " To that the answer is that the intention of Parliament was to place the Benares and Aligarh Universities in the Federal List irrespective of their area of jurisdiction and to give the other Universities to the Centre or the Provinces according as their area of jurisdiction varied from time to time If, for example, the jurisdiction of Calcutta or Patna or, for that matter, any other University with " multiple jurisdiction, ' is curtailed and restricted to one " unit " by competent authority, it will come under the Province concerned; so long as that is not done it belongs to the Centre

Mr Desai then said that he did not know what ' unit meant in entry 33 of List I He did not know if it meant a Province or not Mr. Desai might find his answer in sub-section (2) of s 311 of the Act which provides that " unit " means a Governor's Province, a Chief Commissioner's Province or a Federated State Sir Nripendranath Sircar might have relied for his contention also on the principle as incorporated in s 100 of the Act that if there was conflict between List I and List II, then List I prevailed * We have little doubt, therefore, that on the general rule of construction of the statute and the appropriate section and by entry 33 of List I and the relevant Order in Council the jurisdiction of the Centre extends to the Universities which are " corporations with objects not confined to one unit " It seems to be equally clear that the Governor-General or the Central Government have no power to confer upon a Province legislative competence in regard to a subject which by or under the Constitution Act belongs to the

* That principle was accepted by the Solicitor General in the course of a Committee debate on the Seventh Schedule May 1935

Federal sphere of legislation.* The Patna University Bill was perhaps bad in law and beyond jurisdiction in so far as it sought to bring a Provincial subject, namely, the Andhra University, within the purview of the Centre by extending its jurisdiction to certain parts of Orissa.

Delegation by the Centre in executive matters.

But, as we have seen, it is open to the Governor-General acting on the advice of his responsible Ministers and, pending the inauguration of Federation, to the Governor-General in Council, under s. 124 (1), to entrust conditionally or unconditionally, with the consent of the Government of a Province or the Ruler of a Federated State, to that Government or Ruler or to their respective officers, the executive functions that belong to the Centre under the Act.† In one case delegation is to the Government and in the other to the Ruler so that if and when complete responsible government is introduced in a Federated State there may be frequent conflicts between the Ruler of such a State and its Government in connection with the exercise of the delegated authority. For the obligations assigned to a Ruler are not in law the obligations of the Government of the State responsible to a freely elected legislature and, through it, to the people.

The delegation of executive authority as contemplated in the section has been effected in several cases. The executive functions of the Centre relating to the Calcutta University have been entrusted to the Government of Bengal,‡ with the latter's consent, subject to the conditions (*i*) that the Government of

* These views were for the first time urged by the author in the columns of *Advance* and *Hindusthan Standard* (Calcutta), and subsequently taken up by the University of Calcutta in connection with a proposed Secondary Education Bill in Bengal. The author's contention has been upheld by the British Government as will be clear from the addition sought to be made to entry No. 17 in the Provincial List of the Seventh Schedule by an Amending Bill pending before Parliament. The entry in question is to be enlarged as follows: "Education, including Universities other than those specified in entry No. 13 of the Federal List." It means that the Amending Bill proposes to place all the Universities in British India in the Provincial List save the Hindu University of Benares and the Muslim University of Aligarh.

† For discriminatory treatment as between the Provinces and the Federated States in connection with functions in relation to the administration in such States of any law of the Federal Legislature which applies therein read s. 125.

‡ Read Notification No. F. 55-1 (vi)-38-E, dated the 7th April, 1938. Read ss. 5, 7 and 15 of Act II of 1857, and ss. 21, 22, 24 and 25 of Act VIII of 1904 for the changes effected.

Bengal shall not exercise the power to cancel the appointment of Fellows save with the concurrence of the Chancellor and (ii) that as regards affiliation, extension of affiliation or disaffiliation in connection with a College under the University the Bengal Government shall not pass orders save with the concurrence of the Government of the Province wherein the College concerned is situated, and in the event of disagreement between the two Governments, the matter shall be referred to the Central Government for final orders

Similar delegation has been made in respect of these, amongst other, statutes the Negotiable Instruments Act, 1881, the Indian Naturalisation Act, 1926, the Indian Extradition Act, 1903, the Indian Tolls (Army) Act, 1901, the Indian Works of Defence Act, 1903, the Indian Territorial Force Act, 1920, the Auxiliary Force Act, 1920, the Bengal Excise Act, 1909 the United Provinces Excise Act, 1910, the Punjab Military Transport Act, 1916, the Punjab Excise Act, 1914, the Bihar and Orissa Excise Act, 1915, the Eastern Bengal and Assam Excise Act, 1910, the Central Provinces Excise Act, 1915, the Bengal Transport and Travellers' Assistance Regulation, 1806 and the Military Authority (Assistance to Marching Troops) Regulation, 1827 * This delegation is in respect of administrative functions and not of legislative competence, power to legislate as to these matters continuing to belong to the Centre despite action under s 124 (1) of the Constitution Act Again under s 123 the Governor-General may direct the Governor of any Province to discharge as his agent in his discretion functions specified in the direction either generally or, in a particular case, in and in relation to tribal areas and, only in a particular case, in relation to defence, external affairs or ecclesiastical affairs

Unitary bias of the Indian Constitution

There is evidence of unitary bias in the provision as regards the reservation for the consideration of the Governor-General of any Bill which may have been passed by the Provincial Legislative Assembly, or, in the case of a Province having a Legislative Council, may have been passed by both Chambers of the Legislature, in the exercise of its or their

* For details read the *Government of India Notifications* issued in 1938

legitimate legislative competence.* But whether it should or should not be so reserved is a question which is left to the Governor acting in his discretion. According to the Instrument of Instructions, which, by the way, does not seem to be enforceable in a court of law despite s. 53 (1), the reservation is "mandatory" on the part of a Governor in respect of Bills the provisions of which repeal or are repugnant to the provisions of any Act of Parliament extending to British India, or which, in his opinion, would, if they become law, so derogate from the powers of the High Court as to endanger the position which that Court is by the Act designed to fill, or regarding which he feels doubt whether they do, or do not, offend against the purposes of Chapter III of Part V (Provisions with respect to discrimination, etc.), or of s. 299 of the Act (Provisions with respect to *compulsory acquisition of land for public purposes, etc.*), or which, in the case of Provinces where the Permanent Settlement exists, would alter the character of the Settlement.†

The autonomy in the Provinces and responsibility at the Federal Centre as well as in the Provinces and indeed the entire Federal structure are to a considerable extent affected by the provisions made in regard to services recruited by the Secretary of State and persons appointed by the Secretary of State in Council‡ as well as by the provisions dealing with the location of final authority in matters in respect of which the Governor-General§ or the Governor,‖ as the case may be, is required to act "in his discretion" or "in the exercise of his individual judgment."

Provisions for Provincial borrowing.

There will be no comfort for orthodox Federalists in view of the provisions as regards borrowing by the Provinces. A Province is not to borrow outside India without the consent of the

* s. 75.

† cl. XVII of the Instrument.

‡ Chap. II of Part X of the Act and read also Chap. XVI, *supra*. Read in this connection the Rules made by the Secretary of State in virtue of the powers conferred on him by ss. 246 (1) and 250 (1) of the Government of India Act, 1935, as regards the "reserved posts" in the Indian Civil Service, the Indian Police and other Services together with the relevant Schedules. The Rules and the Schedules thereto were published in the Gazette of India of December 17, 1938 (Nos 63-38, 63-38-I and 63-38-II-Ests.).

§ s. 14.

‖ s. 54.

Federation, nor without like consent, to raise any loan within or outside India if there is still outstanding any part of a loan made to the Province by the Federation or by the Governor-General in Council, or in respect of which a guarantee has been given by the Federation or the Governor-General in Council.* It is, however, to be understood that the Federation is not to act perversely in frustrating *bona-fide* schemes in this behalf of any Provincial Government; and if any dispute arises as to the fairness or otherwise of any action taken by the Federal Government in respect of *matters specified in the section, it shall be referred to the Governor-General* and his decision taken in his discretion shall be final.†

It is doubtful if the Governor-General will be able to maintain the position of an impartial arbitrator as contemplated under the section read with his "special responsibility" to safeguard the financial stability and credit of the Federal Government.‡ Regard being had to the need for large sums of money for purposes of economic development and social reconstruction in every Province, the control of the Federation over Provincial borrowing is looked upon with suspicion by the orthodox upholders of Provincial rights. In theory there may be objection to such control, but from the practical standpoint at least in the early stages of Federation *the Centre may justifiably claim to intervene to avert any financial* catastrophe in any of the Provinces which may have its repercussions in all parts of the country.

Federal control of Provincial audit

There is provision for a measure of Federal control over the audit and accounts of a Province. The Auditor-General of India shall perform such duties and exercise such powers in relation to the accounts of the Federation and of the Provinces as may be assigned by an Order in Council or by any subsequent Act of the Federal Legislature varying or extending such an Order.§ It is, however, open to a Provincial Legislature, after the expiration of two years from the commencement of Part III of the Act, by legislation to charge the salary of an Auditor-General of the Province on its revenues; and if it is so done, His Majesty may, on the expira-

* s 163 (3)
† s 163 (4)
‡ s. 12 (1) (b).
§ s. 166 (3)

tion of at least three years from the date of the appropriate Provincial Act, appoint a Provincial Auditor-General to perform the same duties and exercise the same powers in relation to the *audit of the accounts of the Province* as would be performed and exercised by the Auditor-General of India, if a Provincial Auditor-General had not been appointed.* But in any case, in so far as the Federal Auditor-General may, with the approval of the Governor-General, give any directions with regard to the *methods or principles in accordance with which the accounts of the Provinces ought to be kept*, it shall be the duty of every provincial Government to cause accounts to be kept accordingly.† A distinction thus appears to have been made between the audit of accounts and the methods or principles in accordance with which accounts are to be kept.

Mention has been made of the provisions as regards administrative relations between the Federation and the units,‡ but they do not, even in strict theory, detract much from the autonomy plan and are incidental to the effective functioning of the Federation. But there is a centripetal tone in the provisions as to the breakdown of the constitutional machinery in the Provinces. No proclamation declaring an emergency shall be made by a Governor without the concurrence of the Governor-General in his discretion.§

The rule of "immunity" in India.

The American doctrine of "the immunity of instrumentalities" as laid down in *McCulloch* v. *Maryland* seems to have been recognised, if only in a restricted sense, for the Federal "instrumentalities" as distinguished from the Provincial "instrumentalities" in s. 126 of the Government of India Act, 1935. It is doubtful whether, in a case of conflict between the two sets of "instrumentalities," the Provincial "instrumentalities" can claim successfully any immunity at all. The provisions of the section dealing as they do with the exercise of executive power should not be construed as extending to the legislative competence of the Centre and the Provinces. The scope is

* s. 167 (1).
† s. 168.
‡ ss. 122-128.
§ s. 93 (5).

restricted It appears to us that in interpreting the Act the courts should be guided by the language of the statute and not by the general doctrine of " implied prohibitions " or " the immunity of instrumentalities " so popular in the American Federal system, especially in view of the latest Dominion decisions

Location of residual power

The manner in which the residual power has been dealt with raises a difficult and delicate issue It is largely due to a sharp conflict of opinion generally between Hindus and Moslems Whether such power in respect of a subject or a tax not mentioned in any of the three Lists of the Seventh Schedule shall be exercised by the Federal Legislature or by a Provincial Legislature is a matter which under the Act must be decided by the Governor-General in his " discretion," and the administration of the law will belong to the Federation when it is Federal law and to the Provinces when it is Provincial law, unless the Governor-General otherwise directs The relevant law on the subject is stated thus

> The Governor General may by public notification empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in the Seventh Schedule to this Act including a law imposing a tax not mentioned in any such list and the executive authority of the Federation or of the Province as the case may be shall extend to the administration of any law so made unless the Governor General otherwise directs
> In the discharge of his functions under this section the Governor General shall act in his discretion *

The section places the Governor General in a rather unenviable position It would be extremely difficult for him to decide on his own responsibility whether a particular subject is or is not outside the scope of the three Lists Nor is his decision in this respect to be regarded as final, for it is open to competent courts to pronounce a contrary decision on a disputed matter raised before them The Governor General's decision is immune from the jurisdiction of courts only when it is confined to the residuary field proper, that is to say, a

* s 104 (1) and (2)

field which, upon authoritative interpretation, does not come under any of the three Lists. It is not within his competence to decide whether a particular subject comes within the residuary sphere and thus affect the general scheme of distribution in the Seventh Schedule. The best and safest course for the Governor-General in the circumstances would be to refer any disputed matter (whether the subject in question is or is not covered by the Lists) to the Federal Court under s. 213 of the Act and, armed with the opinion of that Court, to proceed to deal with the matter. Within the residue the decision of the Governor-General is final subject to the provisions of s. 14. It appears from the language of the section that the Governor-General is competent to empower the Federal Legislature or a Provincial Legislature exclusively to legislate as to a matter not enumerated in any of the three Lists as also to give it the effect of the Concurrent List.

Under the section the question of the Governor-General acting on the advice of his Ministers or even taking them into consultation does not in law arise unless by steady pressure Ministers can assert themselves and nullify in practice the statutory provisions by constitutional usage. The purpose of the section, however, is to reserve the power of allocation in the residuary field to the Governor-General acting under the supervision and control of the Secretary of State as distinguished from the Governor-General acting on the advice of his Ministers. It is suggested by some that this "discretionary" power of the Governor-General will, by easy and natural transition, pass to the Governor-General acting on the advice of his responsible Ministers. Having regard to the Moslem sentiment on the question, it is difficult to say with anything like precision if such development will take place within a measurable distance of time. Note should be taken of the phrase "in his discretion" used in sub-section (2) of the section in understanding the creative minds behind the statute.

We see no reason why the Centre should have been deliberately denied the power which in a country like India should belong to it even during the period of transition. Here is another case in which there has been a

surrender to the particularist or parochial clamour of a certain section of the minorities in disregard of the interests and requirements of the country as a whole In India under the Federal scheme the Provinces were not required to surrender any of their sovereign powers to the Centre as was generally the case in U S A, Australia and Canada (at least for some of the States and Provinces), for in no sense had sovereignty ever belonged to them, especially on the transfer of the administration to the Crown after the Mutiny

The project, therefore, has conferred upon them a certain measure of sovereignty in those spheres which have been allocated to them and accorded them a status which they had not hitherto enjoyed Of course it has resulted in some diminution of their functions on account of delimitation of power so that in some of the subjects as to which in the earlier regime they could legislate with the prior sanction of the Governor-General* they have under the present system no jurisdiction But that power they exercised in pursuance of their delegated authority and not of their sovereign rights On the other hand, there is accretion of power to them in other subjects

Minority rights and residual power

Again in the case of the States accession to the Federation is more or less voluntary while the Provinces had no option in the matter There is, therefore, no room for the suggestion that the Provinces were entitled to the residual power by way of compensation for the loss of sovereignty as had been the case with the Australian States or the States of America Besides, there seems to be no valid ground for Moslem opposition to the vesting of residuary powers in the Federal Centre as we have shown in a previous chapter A careful student of political science† is disposed to concede, though not without considerable reluctance, that there is ground for Moslem apprehension that should the residual power belong to the Centre it might be exercised to the prejudice of the interests of the Moslem community, and that, by implication, the rights of that community are better protected in the Provinces than at the Centre

* s 80A (3) of the Government of India Act

† *The Reforms Scheme A Critical Study* by D N Banerjee p 153

where they will be in a permanent minority. We differ from that view. We refuse to believe that the Provinces as such will be more considerate and sympathetic than the Federation in their treatment towards minorities.

We may here repeat Mr. F. R. Scott's note of warning to the minorities in Canada. *Apropos* of the minority rights in the Dominion he wrote: "Possibly the Judicial Committee have thought that in cutting down the Dominion powers they were assisting the minority in Canada. If so, they were grievously mistaken. It is little comfort for the French-Canadian minorities in the Maritimes, in Ontario, Manitoba, and Saskatchewan to realise that the Provincial Governments on which they depend for their educational privileges and their civil rights have had their powers enlarged, and that the Dominion Parliament, in which the French-speaking members must always exercise a powerful influence, has been deprived of much of its former capacity. Provincial rights and minority rights would be identical if the minority were confined to the Province of Quebec."*

Similarly and for identical reasons it would be little comfort for thoughtful Moslems in areas other than predominantly Moslem Provinces to find the powers of all the Provinces enlarged and those of the Federal Centre correspondingly reduced. The Moslem population is spreading throughout the country, and it is to the interests of the Moslems themselves to have more power concentrated at the Centre where in all spheres legislative, executive and judicial, they will have either under statute or by convention more effective representation and as such greater degree of control than in the Provinces other than the predominantly Moslem areas. This is a point which no Mahomedan can afford to ignore and which thoughtful mahomedans, we trust, will bear in mind in approaching the problem. There is, however, no denying the fact that the Lists in the Seventh Schedule are so exhaustive as to leave little or nothing for the residuary field. There is room for frequent conflicts between the Lists in the Seventh Schedule and not perhaps between those

* Reprinted in Dawson's *Constitutional Issues in Canada*: 1900-1931, pp. 352-53.

Lists and the residuary field What is objected to is the underlying principle of the section

Peculiar to a Federal system is the supremacy of the Constitution and the judiciary is the symbol of that supremacy as the interpreter and guardian of the Constitution The Federal Court which has been set up* is, therefore, an essential part of the system inaugurated under the Government of India Act, 1935 The functions of that Court are (i) Original,† (ii) Appellate‡ and (iii) Advisory §

The Federal judiciary

Its original jurisdiction lies, to the exclusion of any other court, in any dispute between any two or more of the following parties, that is to say, the Federation, any of the Provinces any of the Federated States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of legal right depends subject, in the case of a State, to certain specific directions mentioned in the proviso to the section Any judgment pronounced by the Court in the exercise of its original jurisdiction shall be declaratory, a provision on which Sir Tej Bahadur Sapru relied in stressing the limitation of the Federal Court decisions as against Professor Morgan's warning to the Rulers that the effect of the jurisdiction is likely to be far-reaching Where, as in a Federation, different authorities, supreme in their respective spheres, are parties to a dispute, the decision, whatever it may be, is as a rule to be declaratory, for it does not lie in the Federal Court to grant coercive power to one supreme authority against another It is, however, to be presumed that the decision will bind the parties concerned unless there is open revolt Besides, it has been laid down in the Act itself that all authorities, civil and judicial, throughout the Federation, shall act in aid of the Federal Court ||

I Original jurisdiction of Federal Court

* s 200
† s 201
‡ s 205
§ s 213
|| s 210 (1)

The Court's Appellate jurisdiction.

So far as the appellate jurisdiction of the Court is concerned, a measure of confusion exists; and we are afraid that the relevant section and the modifications made by Order in Council* in ss. 109, 110 and 111 of the Code of Civil Procedure are not properly worded. It appears, however, that an appeal will lie from any High Court in British India† provided the High Court certifies that the case involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder, but where any such certificate has been given different grounds may be urged in the appeal, that is, that the constitutional question has been wrongly decided, or that the subject matter of the suit heard by the High Court on appeal or in exercise of its original civil jurisdiction is ten thousand rupees or upwards, or that if, where the order or decree appealed from affirms the decision of the Court immediately below the court passing such order or decree, the appeal involves some substantial question of law.‡ Any other ground may be urged with the leave of the Federal Court.

A distinction is thus made between a certificate and the grounds of appeal so that when the certificate has been given issues of a civil nature may be decided by the Federal Court in exercise of its existing appellate jurisdiction. The phrase "whether the case is a fit one for appeal" as used in clause (c) of s. 109 of the Code of Civil Procedure or "whether the appeal involves a substantial question of law" as used in s. 110 of the Code must not be construed as referring to any question of law as to the interpretation of the Act or any Order in Council made thereunder.§ The same procedure *mutatis mutandis* is to apply to criminal appeals from a High Court provided it issues a certificate that the judgment, decree or order involves a constitutional issue.

* Schedule I to the Government of India (Indian Laws Adaptation) Order, 1937.

† s. 205. Appeals from the High Court in a Federated State also lie to the Federal Court on certain grounds (s. 207). It appears that no appeal under s. 205 lies to the Federal Court even from the highest court in a Province or a Federated State where that court is not a High Court. It is an unfortunate constitutional anomaly which should be removed.

‡ ss. 109 and 110 of the Code of Civil Procedure.

§ s. 111A of the Code.

It is unfortunate that the interpretation of laws passed by the Federal Legislature in exercise of its exclusive legislative competence should have been excluded by the Act from the appellate jurisdiction of the Federal Court contrary to the express recommendation of the Joint Parliamentary Committee * There is, therefore, no direct or automatic method of securing a uniform interpretation of Federal laws or of correcting misinterpretations of those laws by Provincial Courts

The appeal to the Privy Council is preserved,† but not in matters within the seisin of the appellate jurisdiction of the Federal Court in respect of which no direct appeal shall lie to His Majesty in Council, either with or without special leave ‡ The Federal Legislature may by Act enlarge the appellate jurisdiction of the Federal Court to provide for appeals in civil cases without any certificate and abolish in part or in whole the Privy Council appeal in such cases either with or without special leave No Bill making such provision is to be introduced without the previous sanction of the Governor-General in his discretion § An appeal lies to the Privy Council without leave from any judgment delivered by the Federal Court in the exercise of its original jurisdiction, and in any other case, by leave of the Federal Court or of His Majesty in Council ||

The Governor General s reference to the Court

The advisory function of the Court is not absolutely free from difficulty The Joint Parliamentary Committee have compared it with the jurisdiction possessed by the Privy Council under s 4 of the Judicial Committee Act of 1833,¶ but while it is clear that the Court's advisory jurisdiction is not limited to the Federal sphere and extends to " any question of law that the Governor-General in his discretion may be pleased to refer to it, it is not clear whether he is given power to consult the Court with regard to any matter involved in a case pending

* J P C Report para 435 and the Explanatory Memorandum appended to the *Government of India Bill* para 4

† s 208

‡ s 205 (2)

§ s 206

|| s 208

¶ 3 & 4 William IV c 41

before any subordinate Court. It is submitted that in a pending case the Governor-General will be well-advised in deferring action until its disposal by that court. The Federal Court's decision in this behalf is subject to appeal by its own leave or by leave of His Majesty in Council.*

Necessary adaptations made in existing Indian laws.

The Federal character of the Constitution is brought out in the incidental and consequential changes effected by Order in Council in certain existing Indian laws. For example, prosecution for offences under Chapter VI or IX-A of the Indian Penal Code (except s. 127) or under ss. 108A, 153A, 294A and 505 of the same Code no longer requires any sanction from the Governor-General in Council or any officer empowered by him in that behalf. A competent court is bound to take cognizance thereof upon complaint made by order of, or under authority from, the Provincial Government concerned or some officer empowered by that Government in that behalf.† The same procedure is to apply to s. 196A of the Code of Criminal Procedure. As for s. 197 of the Code, for " previous sanction of the Local Government " in sub-section (1) has been substituted " previous sanction," (*a*) in the case of a person employed in connection with the affairs of the Federation, of the Governor-General exercising his individual judgment, and (*b*) in the case of a person employed in connection with the affairs of a Province, of the appropriate Governor exercising his individual judgment. " Such Government " in sub-section (2) is replaced by " the Governor-General or the Governor, as the case may be, exercising his individual judgment."

Powers of clemency.

Again power to suspend or remit sentences as in s. 401 or power to commute punishment as in s. 402 of the Code of Criminal Procedure has been conferred upon the Provincial Government as defined in the General Clauses Act.‡ But a new section has been inserted in the Code§ empowering the Governor-General also, in the case of

* s. 208 (*b*).
† s. 196 of the Code of Criminal Procedure.
‡ s. 43A (X of 1897).
§ s. 402A (V of 1898).

sentences of death, to exercise in his discretion the powers conferred upon the Provincial Government by ss 401 and 402. This follows from the provisions of s. 205 (1) of the present Government of India Act which has conferred upon the Governor-General, acting in his discretion, *as respects sentences of death*, all powers of suspension, remission or commutation of sentence as were vested before the commencement of Part III of the Act in the Governor-General in Council The effect of s 402A of the Code read with this section is the elimination of the Government of India in regard to the exercise of powers of clemency for a person convicted in a Province

By *statute* the Governor-General's powers of interference are restricted in a Governor's Province to *sentences of death only*, but no such restriction applies to the exercise of powers that may be delegated to him by His Majesty * By *Letters Patent* passed under the Great Seal of the Realm constituting the office of the Governor-General of India (dated the 5th March, 1937) the Governor-General is authorised and empowered in His Majesty's name and in his behalf to grant to any offender convicted in the exercise of its criminal jurisdiction by any Court of Justice within His Majesty's territories in India a pardon, either free or subject to such lawful conditions as to him may seem fit †

There is also statutory saving for His Majesty's prerogative right to grant pardons, reprieves, respites or remissions of punishment ‡ Doubt has been expressed in certain quarters,§ relying on *Nadan* v *The King*,‖ as to the power of a Dominion to affect His Majesty's prerogative of mercy There is, however, no ground for such doubt in view of the provisions of the Statute of Westminster, 1931,¶ and the decision in *The British Coal Corporation* v *The King*** to the effect that a Dominion Legislature may abolish any part of

* s 295 (1) of the India Act 1935

† cl 2 read with sub section (2) of s 295 of the India Act 1935

‡ s 295 (2) of the India Act, 1935

§ N Raja Gopala Ayyangar *The Government of India Act 1935* pp 305 06

‖ A C 500 (1935)

¶ s 2 (2)

** A C 482 (1926)

the royal prerogative in so far as it was applicable to that Dominion. The case in India is different.

The statutory allocation of powers under the new India Act necessitated a drastic amendment of the old procedure as regards suits and proceedings in which the Government were involved either as plaintiff or defendant (the Secretary of State in Council formerly represented them); and provisions have accordingly been made by which the Federation may sue or be sued by the name of the Federation of India and a Provincial Government may sue or be sued by the name of the Province.* Special provisions have been made in the case of any liability arising before the commencement of Part III of the Act or arising under any contract or statute made or passed before that date.†

Suits and proceedings.

Now, although there are, as we have seen, sections of the Act derogating from a Federal plan, there is no denying the fact that the Constitution set up is in the main and in substance distinctly of a Federal type despite the source from which it has emanated; and Ministers, who are anxious to enlarge the ambit of powers of the units, have enough ground to work upon. Nor does the provision as to the vesting of residual powers constitute in any way rejection of the Moslem demand unless the power of the Governor-General in this behalf comes by convention or usage to be exercised not in his discretion as is required under the Act but on the advice of his responsible Ministers the majority of whom are likely to be Hindus so long as the Legislature is elected or formed as at present or as contemplated under the present India Act on a separate electoral basis. The Federal system as envisaged in the present Government of India Act is, however, a type by itself; it is *sui generis*.

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* s. 176 of the India Act, 1935.
† s. 179.

CHAPTER XIX

CONCLUSION

There can be no right, proper and effective solution of the problem of minorities in India unless it is based on a frank recognition of certain essential facts and principles. The Indian problem has peculiar and distinctive features of its own. Although the Mahomedan and other minorities do not in all cases satisfy the numerical test laid down in the League decisions in regard to *local* or *regional* claims to protection, they cannot be treated as of no account. The relative or proportionate strength of the minorities is of course a point to be considered in any scientific scheme of protection, but the huge numerical strength of the Mahomedans and of the Hindus and the Sikhs, wherever they are in a minority, and the large interests that each has created in the country and its importance in the social economy are factors to be reckoned with. Speaking of the Mahomedan community the late Maulana Mahomed Ali said that "*a community that in India alone must now be numbering more than seventy millions cannot be easily called a minority in the sense of Geneva minorities*." The Maulana was, if we may say so, perfectly right in the view he felt constrained to express.

Peculiar features of the Indian Problem

On the other hand, it ought to be remembered that in Europe the minorities, who were sought to be protected under the International Treaties, were forced in most cases to accept new "nationalities" and swear allegiance to new States generally controlled by peoples alien in race, language and culture and, in some cases, in religion also. No such drastic change is contemplated in the reconstruction of the Government in India. There was no question of the re-drawing of her political map except in the case of Burma which has been separated from India under the present constitutional arrangements, or of

the revision of her frontiers as in Central and Eastern Europe. There is no change in political allegiance, although a wide extension of popular control over affairs relating to public business has been effected under the new Constitution partially at the Centre and, in a large measure, in the Provinces. Besides, it is a point yet to be proved whether the vast majority of the Mahomedan population come from a racial stock different from that to which the Hindu masses, the Indian Christians or the Sikhs belong. There is mass of evidence to the contrary.

Dangers in experiments.

Whatever might be the nature and extent of protection guaranteed to minorities, it must not be provided on the assumption that it will be temporary subject to revision or alteration at some future date based upon terms of agreement between the parties concerned. If any particular demand put forward on behalf of any minority community is considered essential to adequate and effective protection, that demand must be conceded without any qualification. If, on the contrary, it is held to be such as to affect prejudicially the interests of the country as a whole, it must be rejected without regret.

There is no use making a temporary or experimental arrangement. It is a risky proceeding. Any temporary makeshift is bound sooner or later to raise the question of *status quo* which it would be difficult to ignore as is clearly suggested by the general Moslem attitude towards the system of electorates. What has once been must always be, particularly when the questions involved are difficult and delicate to a degree such as those connected with the protection of linguistic, religious or racial minorities. Experiments in such matters may prove dangerous, and perhaps, on occasion, disastrous also. If a concession bad in principle and injurious in practice is granted, those who make the concession will some day be faced with a *fait accompli* which it would be impossible to alter or modify save by resort to force or at least by the threat of force.

An agreed solution a remote possibility.

It is stipulated in regard to the Communal Award, of which no thoughtful and impartial student of political science and constitutional law can approve at least on principle, that it can-

not be altered except by agreement between the parties affected or by Order in Council by His Majesty. It is only commonsense that if a particular community has by the award been placed in a position of vantage as a community, it will not of its own accord give assent to its modification unless the modification proposed further consolidates its advantageous position, and we have serious doubts if the communities, who stand to gain by the provisions of the award, will ever be parties to an agreed solution even if such solution may, on grounds of public policy as well as in the interests of communal peace and harmony, be considered urgent, imperative and essential

Nor is it clear from the present Government of India Act and the discussions on the Bill in Parliament what the 'agreement' contemplated in Mr Macdonald's pledge actually means—a gap in the instrument which is likely to accentuate communal bitterness and fan the flames of communal jealousy and bitterness *Apropos* of the provisions of the Bill as subsequently incorporated in s 308 of the Act a considerable body of Mahomedans declared that their community would not be satisfied unless it was definitely laid down that no proposals for alteration of the provisions of the award would be accepted should that community as represented in the appropriate legislature fail by a decisive majority (say by 2/3rds, 3/4ths or 4/5ths majority) to approve of them They demanded, in other words, such statutory protection of the award as, at present and in circumstances one can foresee to-day, would render it absolutely unalterable His Majesty's Government appear, however, to have made the communal settlement a rather rigid instrument for all practical purposes, although they have not accepted the proposal referred to above

It is again difficult to explain, on constitutional grounds, why on a complicated issue like the communal problem Parliament should have allowed itself, apparently at the instance of Mr Macdonald and his colleagues, virtually to place the matter in the hands of communalists in India especially when care was taken to impose unnecessary and uncalled-for restrictions on the law-making powers of the

Federal and Provincial Legislatures in other respects. It is submitted that when there was no objection to settlement by "agreement" without the intervention of Parliament or His Majesty's Government the matter might have been referred to an Inter-Imperial Tribunal, or better still, to an International Tribunal of detached, independent and impartial experts. It was perhaps not without reason that His Majesty's Ministers responsible for the award should have become suspect in the eyes of Indian nationalists.

Nor, in our considered judgment, has the case been convincingly made out for ten years' restriction as envisaged in Mr. Macdonald's announcement accompanying the award and reaffirmed in the relevant section of the India Act. Even if by the operation of a miraculous phenomenon or on account of a healthy change in inter-communal relations in the country the communities arrive at an agreed settlement, for ten years after the coming into force of the revelant part of the Act their efforts in the direction of communal peace may be frustrated. They may have to stay their hands, shut their ears and close their eyes, and the award will go on functioning without interruption in spite of them unless in the meantime a sympathetic, accommodating and kind-hearted Secretary of State advises His Majesty to issue an Order in Council incorporating the settlement. It is to be noted, however, that the point urged against this procedure is technical rather than substantial; for should an agreed formula be arrived at the British Government would in all probability accept it.

Parties must be political and not communal.

While it is recognised that so long as minorities, who constitute a large mass of the country's population, are not reasonably protected the State cannot function with any measure of success, the fact has to be borne in mind that no devices should be adopted which are likely to assail the foundations of national democracy. The division of the State into watertight communal compartments frustrates its object and defeats its purpose. There is ample room for the growth and development of parties in modern democracies; in fact parties keep them efficient and always on the alert. But parties must be based on political

ideals and on economic principles and in no case on religious doctrines or race prejudices.

In Europe there are thinkers and statesmen who are sincerely anxious to seek refuge from the aggressive and militant orthodoxy of a national State in the quiet and kindly adaptibility to modern needs and circumstances of what they call an un-national State. Take the Versailles Treaty. Mr. Asquith called it a "folly" and said that it contained "the germs of a future war." Folly it was for more reasons than one, but will the revision of frontiers alone give a war-weary world the peace it needs so much? It is impossible to devise frontiers in Europe or elsewhere in such a manner as to give every ethnological, religious or linguistic group a self-contained State. There must be mixed populations from the very nature of the circumstances. What is needed, therefore, for a lasting solution of the problem is wide outlook, human sympathy and mutual regard for each other's legitimate rights. The new Roumanian Constitution of February, 1938, followed by a Royal Ordinance of May of the same year, would give food for thought to harassed statesmen in Europe and India. Of course they contain nothing new practically. They reproduce the stipulations of the Guarantee Treaties and of the laws already in force. It is, however, the spirit that matters. It is the spirit of enlightened statesmanship—may be the bourgeois-democratic spirit—that seems to inform the policy of King Carol and his Government.

But will it satisfy the minorities? Perhaps their wounds are deeper than what appears on the surface. Perhaps, throughout Europe, their clamour is for something no State can concede without undermining its territorial integrity. What has happened in Czecho-Slovakia may occur in Roumania, Hungary, Poland or in any other State. Was not Czecho-Slovakia considered to be one of the best-administered Succession States in Europe from the standpoint of minorities protection by competent observers only three or four years ago? Almost the whole of Central and Eastern Europe is in the process of dissolution. The germs of internal disruption are there. There is distrust and suspicion. The entire atmosphere is inimical to any peaceful solution of the outstanding problems. For the present the wistful eyes of Europe are riveted on Danzig and Ruthenia,

and Poland, Hungary and Roumania all demand Ruthenia. In the background Russia gives no evidence of her faith in a self-denying ordinance. By a Vienna settlement part of Ruthenia has been given to Hungary; its long-promised autonomy has been conceded; and its official name has been changed to Carpatho-Ukraine. But where, one wonders, is the end of this mad race for power in Europe! In India the best and most effective solution of the problem of minorities ought to be sought not in the legal and extra-legal emphases on communal, religious, caste or racial differences but in the steady development of forces tending to the evolution, largely on an economic plane, of a healthy political platform and to the advancement of the general culture of the nation.

It is true that people of a particular sect and professing a particular religion understand and appreciate one another more easily than new and strange faces. They have the same bias and prejudice, appreciate the same kind of enjoyment, have the same outlook on life and social behaviour and detect the same inexorable hand of Providence in the mysterious scheme of creation. Certain types of misbehaviour they agree in dismissing as naught; for others they are unanimous in invoking the aid of Satan and his brood. But the importance of these factors is liable to be rather too much exaggerated. There are influences of environment due largely to political, geographical, economic and climatic causes which are probably more powerful in determining habits of thought and social or public conduct than factors of caste, religion or race. In the new era of monopoly capitalism even these influences are liable to be overshadowed by *class consciousness*. Hindus, Mahomedans and other communities, who have permanently settled down in this land, should proceed together along lines of territorial and political loyalty than along those which in India as elsewhere have led to the splitting of human blood and the breaking of neighbours' heads. There must, however, be the amplest measure of religious and social freedom in the country which ought to be adequately protected against interference by persons for the time being controlling the machinery of government.

Certain principles such as freedom of speech, protection from arbitrary arrest and guarantees to minorities in connection with their religious observances and linguistic and social rights, ought to be treated as fundamental to the constitutional system and must not be invaded or encroached upon either by the legislature or the executive except by a special procedure, to which access is not always possible and convenient That system has been adopted in the United States, as will be clear from the First Amendment (Article I) to its Constitution * The statutory guarantees suggested should not be subject to modification or alteration save by recourse to the usual process of constitutional change prevalent, for example, in America Article V of the American Constitution lays down

Certain guarantees fundamental

> The Congress whenever two thirds of both Houses shall deem it necessary shall propose amendments to this Constitution, or on the application of the Legislatures of two thirds of the several States shall call a Convention for proposing amendments which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by conventions in three fourths thereof as the one or the other mode of ratification may be proposed by the Congress provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article and that no State without its consent shall be deprived of its equal suffrage in the Senate

Sir Tej Bahadur Sapru expressed the opinion that " provision may be made in the Indian Constitution for alteration of the

* Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the Government for a redress of grievances The first eight amendments it may be noted are restrictions on the Federal authorities and not on the States These confer rights which a citizen is entitled to claim against any law or process of the United States Government If however he has to seek any remedy against a State recourse is probably to be had to the later portions of the first section of the fourteenth amendment The cause for action against a State arises not because these rights are enumerated in the first eight amendments but because they are of such a nature that they are included in the conception of due process of law [*Twining* v *New Jersey* 211 U S 78 99 (1908)]

Act similar to that in the South Africa Act......"* There will be support for Sir Tej Bahadur's view so far as the Fundamental Rights of the people are concerned. The law on the subject is stated in s. 152 of the Union of South Africa Act which provides :

> "Parliament may by law repeal or alter any of the provisions of this Act: Provided that no provision thereof, for the operation of which a definite period of time is prescribed, shall during such period be repealed or altered: And provided further that no repeal or alteration of the provisions contained in this section, or in sections thirty-three and thirty-four (until the number of members of the House of Assembly has reached the limit therein prescribed, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period), or in sections thirty-five and one hundred and thirty-seven, shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament."

The legal position in South Africa.

The entrenched provisions specified in this section are mainly of two kinds, namely, (*i*) those which might not be altered for ten years after the passing of the Union Act, and (*ii*) and those of ss. 35† and 137,‡ which refer respectively to the qualifications of voters in the Cape and to the language rights and which might not be repealed or altered save with the assent of the two-thirds of the total number of members of both Houses of the Legislature. Strictly from the point of view of law as distinguished from any understanding, the Union Parliament has power, on the passing of the Statute of Westminster, 1931, to alter or repeal the entrenched sections dealing with the native vote and the language rights or any other section without following the procedure required under s. 152. It is true that the Status of

* Sapru : *The Indian Constitution*, p. 158.

† Read paragraph VII of the Royal Instructions (Edward R. and I). These Instructions have no longer any force in view of s. 8 of the Status Act.

‡ Read s. 1 of Act No. 8 of 1925, as regards *Afrikaans*.

the Union Act of 1931 has not repealed the section, but it has not saved it either to the extent and in the manner it has sought to protect the provisions of s 106 (relating to appeals to the King in Council) or the provisions of ss 150 and 151 of the Union Act * The legal position at present, however, is that no Imperial statute which is part of the law of the Union binds the Union Parliament against its will as expressed in its valid legislation and that, so far as local legislation is concerned, it is always open to repeal or amendment locally

Another point should be noted in this connection The procedure set out in s 152 is different from that prescribed in s 63 which specifies the manner in which disagreements between the two Houses may be disposed of A joint sitting under the latter section takes place where a deadlock has been created as a result of disagreement between the two Houses on the merits of any measure while a Bill contemplated under s 152 must originate in a joint meeting Secondly, under the deadlock clause a bare majority of members present at the joint sitting is sufficient to validate a measure while under s 152 at the third reading of the Bill in question it must receive the assent of two thirds of the total number of members of Parliament †

A statutory communal majority subversive of responsible government

To be free a people must be able to choose their rulers at stated intervals because there is no other way of forcing their needs and requirements on the attention of the Government It is essential and fundamental, therefore, to the conference of power that the machinery of executive government should not be at the disposal of a permanent set of men not responsive to public opinion and not liable to be unseated by a popular verdict "Responsible Government," as Professor Laski puts it, " in a democracy lives in the shadow of coming defeat, and this makes it eager to satisfy those with whose destinies it is charged " A statutory majority for any community in the Legislature under a system of responsible government tends to transfer power from the people to a coterie and is, therefore, inimical to the growth of politi-

* s 10

† Kennedy and Schlosberg *The Law and Custom of the South African Constitution* pp 74 84 99 100 102 103 109 110 232 33 and 238 42

cal responsibility in the conduct of the affairs of State. Equally, if not more, important, is the point that adequate safeguards should be provided in the Constitution against centrifugal tendencies, especially against any tendency of what is known as *imperium in imperio*.

The provisions of the present India Act as regards the residual power seem to us to be neither sufficiently clear nor adequate to the peculiar requirements of the country. That power is denied to the Federal Legislature—a concession to Moslem sentiment. The power to allocate it is instead vested in the Governor-General acting in his discretion—perhaps a recognition of the urgent and imperative need for a Central bias. One will not be surprised if in the inevitable conflicts between the Governor-General and his responsible Ministers on this issue the real intention of the authors of the Act is frustrated. It is, however, to be hoped that in the process of constitutional development the Governor-General will refrain from intervening in his discretion in what we consider to be a legitimate Federal sphere of legislative or administrative activity. There is no reason to think that the residual power, should it come to be exercised by the Centre, would be used against the interests of minorities having regard to the composition of the Federal authorities and to the special protection otherwise guaranteed to them.

The problem of boundaries revision.

If the boundaries of the Provinces are attempted to be revised, the alteration must be made with the greatest possible caution and after the fullest examination by an expert and independent Commission of Enquiry so that no new Province may be created which might encourage disruptive forces by alliance with foreign Powers and no Province already in existence may be so strengthened as to enable it to defy the authority of the Centre in matters affecting the life of the nation as a whole. The new India Act has laid down a detailed procedure by which steps may be taken to (*a*) create a new Province, (*b*) increase the area of any Province, (*c*) diminish the area of any Province, and (*d*) alter the boundaries of any Province.*

* s. 290. It is to be read with s. 308. The total membership of either Chamber of the Federal Legislature is saved, and alterations that may be lawfully effected shall not

The power in this behalf may be exercised by Order in Council subject to the condition that the Secretary of State will have, before the draft of the Order is laid before Parliament, to ascertain, in accordance with any directions that may be issued by His Majesty, the views of the Federal Government and Federal Legislature and of the like authorities of the Province concerned, both with respect to the proposal for the Order and with respect to the specific provisions to be embodied therein It is understood that no action will be taken in opposition to the clearly expressed views of the authorities in India likely to be affected, but the safeguard in law is not effective for the obvious reason, first, that His Majesty may not issue any directions to ascertain the views of the Indian authorities concerned, and, secondly, that the views of the Indian authorities, if at all ascertained, have under the section no binding effect * For purposes like these which involve complicated racial, linguistic, administrative and financial questions the setting up of an independent and expert Commission of Enquiry to report and make recommendations seems to us to be the only right and correct procedure Such a Commission may throw light where it is needed, it may be depended upon to approach the issues without any bias and in a spirit of scientific detachment

Bengal, by the way, has a legitimate grievance, according to a considerable section of public opinion, in that His Majesty's Government have completely ignored its demand that on grounds of culture, language and natural affinity certain districts in Bihar and Assam should have been transferred to it especially when note is taken of the fact that concessions have been made to the peoples in Sind and Orissa without regard to the heavy financial liabilities of a new Province which the Federal Exchequer will have to undertake† for the purpose for a considerable period of

affect the majority given to a community in that Legislature under the award in or in respect of a Province

* An analogous power was vested under s 52A of the repealed statute in the Governor General in Council exercisable with the sanction of His Majesty previously signified by the Secretary of State in Council In exercise of that power Burma was constituted into a Governor s Province in 1921 The change is in accord with the status of the Governors Provinces under the Federal system but the expression Province in s 290 means either a Governor s Province or a Chief Commissioner s Province

† *Cf* ss 118 120 of the British North America Act 1867

time, if not permanently. It would be unfair not to add that in the Schedule to the Government of India (Distribution of Revenues) Order, 1936, grants-in-aid have been provided not only for Sind which is a Mahomedan majority Province but also for the United Provinces, Assam, the North-West Frontier Province and Orissa all of which save the Frontier Province are Hindu majority units.* These grants are charged to the revenues of the Federation.†

Demand for redistribution on linguistic basis.

There is demand for new Provinces on a linguistic basis in Andhra in Madras and Karnatak in Bombay while in Bihar there appears to be a growing section of opinion that the claims of Chota Nagpur in this regard should not be brushed aside. The use of a common speech is doubtless " a strong and natural basis " for a Federal unit. " But," as the Simon Commission point out,‡ " it is not the only test—race, religion, economic interest, geographical contiguity, a due balance between country and town and between coast line and interior, may all be relevant factors." They add that " most important of all perhaps, for all practical purposes, is the largest possible measure of general agreement on the changes proposed, both on the side of the area that is gaining, and on the side of the area that is losing, territory." Nor can the question of administrative and financial adjustments involved in redistribution be ignored. While due weight is to be given to the considerations emphasised by the Simon Commission these cannot be effectively urged either in support of the existing distribution of Provinces or against re-

* 1. *The United Provinces* : 25 lakhs of rupees in each year of the first five years from the commencement of Part III of the Act.

2. *Assam* : 30 lakhs of rupees in each year.

3. *The North-West Frontier Province* : 100 lakhs of rupees in each year.

4. *Orissa* : In the first year after the commencement of Part III of the Act, 47 lakhs of rupees; in each of the next four succeeding years, 43 lakhs of rupees; and in every subsequent year, 40 lakhs of rupees.

5. *Sind* : In the first year after the commencement of Part III of the Act, 110 lakhs of rupees; in each of the next nine years, 105 lakhs of rupees; in each of the next twenty years, 80 lakhs of rupees; in each of the next five years, 65 lakhs of rupees; in each of the next five years, 60 lakhs of rupees; and in each of the next five years, 55 lakhs of rupees.

† Para. 9 of the Schedule.

‡ *The Simon Report*, Vol. II, p. 25. See also the *Nehru Report*, pp. 61-69.

distribution as such There is, on the whole, a strong case for reopening the question of redistribution of Provinces

The rule of law and the judiciary

The rule of law depends to a large extent on an independent, impartial and competent judiciary No safeguards are worth the paper on which they are written unless they are enforced effectively In well-organised and democratic communities it is regarded as an elementary principle that the interpretation of law should be entrusted to the judges who at least within limits inherent in the social order can arbitrate fairly and impartially between the State and its citizens and, in a Federation, also between the Centre and the units or between the units *inter se* This makes it essential that high judicial appointments should be held during " good behaviour " and that the judiciary should be otherwise strengthened and rendered immune from the corrupting influence of political intrigue The judge who looks forward to the executive for his security of tenure or for his promotion, or the judge who is encouraged to look to a political career as a source of future distinction cannot retain that detachment and independence of mind which is the pivot of his position *

In England "since 1700, it has been the general policy of the legislature to secure the independence of judges by making their tenure of office secure during good behaviour The judges of the superior courts hold office during good behaviour, but can be dismissed on an address presented by both Houses of Parliament "† In the self-governing Dominions‡ the judges of superior courts are appointed by the Governor-General or the Governor-General in Council but they hold office during good behaviour and are removable, as in the case of judges in England, only on an address from the legislature There is no reason why the present system in India should not be approximated to that prevalent in England

* *Cf* the British Judges *memorandum* of Dec 4 1931 protesting against the proposal for the economy cuts in their salaries and against the judges being treated as servants of the Crown in the sense that the executive are treated as servants of the Crown It was placed by Lord Sankey before the House of Lords in July 1933

† Maitland *Constitutional History of England* p 429

‡ The British North America Act 1867 ss 96 99 The Commonwealth of Australia Act 1900 s 72 The South Africa Act 1909 ss 100 101

and in the Dominions to make the judiciary independent of the executive.

The present Indian system.

In certain respects of course the new India Act is an improvement on the statute now repealed,* especially in so far as it relates to the constitution of the judiciary save as regards the eligibility of members of the Indian Civil Service for appointments to the highest tribunals. The mode of appointment of the High Court Judges under the old Act is in the main preserved and the same procedure is to apply *mutatis mutandis* to the appointment of the Federal Court Judges. They are appointed by His Majesty by Warrant under the Royal Sign Manual.† As regards tenure, however, a change in law has been effected. Under the repealed Act every judge of the High Court held office during His Majesty's pleasure, and any such judge could resign his office, in the case of the High Court at Calcutta, to the Governor-General in Council, and in the other Provinces, to the appropriate "local Government."‡ The present Act provides instead that a High Court Judge is to hold office until he attains the age of sixty years provided (*a*) that a judge may resign his office to the Governor§ or (*b*) that a judge may be removed from his office by His Majesty by Warrant under the Royal Sign Manual on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee, on reference being made to them by His Majesty, report that the judge ought on any such ground to be removed.||

A like procedure is adopted as regards the tenure of a Federal Court Judge except that he is to hold office until he attains the age of sixty-five years, that he may tender his resignation to the Governor-General and that the office of the Chief Justice of the Federal

* The whole Government of India Act, 1915; the whole Government of India (Amendment) Act, 1916, except sections six and eight; and the whole Government of India Act, 1919, except the Preamble and sub-section (1) of section forty-seven, have been repealed (Tenth Schedule to the Government of India Act, 1935).

† ss. 200 (2) and 220 (2) of the new Act and s. 110 (2) of the old Act.

‡ s. 102 (1) and (2).

§ The old difference in status between the High Court at Calcutta and the other High Courts in India is thus abolished, a logical sequence to the Federal system.

|| s. 220 (2).

Court is not open to members of the Indian Civil Service.* Formerly, therefore, the High Court Judges held office "during His Majesty's pleasure" while under the new Act both they and the Federal Court Judges hold during what in law is called "good behaviour" But the provision as to reference to the Judicial Committee for report for dismissal emphasises the subordination of the Indian judicial system to London

The Secretary of State in Council was authorised under the Government of India Act to fix the salaries, allowances, furloughs, etc , of the Chief Justice and the other Judges of the High Courts,† and their salaries and pensions were non-voted ‡ Under the new Act their salaries, allowances, pensions, etc.,§ as well as those of the Federal Court Judges,‖ are determined by His Majesty by Order in Council The salary of a judge or his rights in respect of leave or pension, cannot be varied after his appointment The salaries of the Chief Justice and other judges of the Federal Court and those of the Chief Justices and other judges of the High Courts have been respectively specified in the Government of India (Federal Court) Order, 1936,¶ and the Government of India (High Court Judges) Order, 1937 **

In the latter Order the rank of judges including the Chief Justice is also specified, but confusion may arise as regards the precedence of the Federal Court Judges as compared with the Chief Justices of the Provincial High Courts The scale of salaries is perhaps no guide, for while a Federal Judge's salary is fixed at Rs 5,500 per month, the annual salary of the Chief Justice at Madras, Bombay Allahabad, Patna and Lahore at Rs 60,000 and that of the Chief Justice at Nagpur at Rs 50,000 The annual salary of the Chief Justice at Calcutta is Rs 72,000 In the Commonwealth of Australia there has been trouble over the question of precedence in view of the existence of Federal and State lists The Federal list places State Chief Justices below the High Court Judges while the States give prece-

* s 200
† s 104
‡ 72D (3) (iv) and (v)
§ s 221
‖ s 201
¶ Para 4
** Para 5, Second Schedule

dence to their Chief Justices over the High Court Judges. The gap in the new India Act is unfortunate, although the question of rank is of little or no importance except on ceremonial State or Court functions.

The salaries, allowances, and pensions payable to, or in respect of, the judges of the Federal Court are charged to the revenues of the Federation* whereas the expenditure in respect of the *salaries* and *allowances* of judges of any High Court is charged to the revenues of the Province concerned.† But the *pensions* payable to, or in respect of, judges of any High Court are charged to the revenues of the Federation and not to those of the Province, and Professor Keith is not correct in suggesting that the *salaries* of the judges of any High Court are charged to the revenues of the Federation.‡

Equally erroneous perhaps is Professor Keith's view that the powers of the High Courts "are continued§ under the new Act," for if a comparison is made between the provisions of s. 107 of the repealed statute and those of s. 224 of the present Act reduction in powers of the High Courts becomes evident. Under the old regime any High Court could direct the transfer of any suit or appeal from any court subject to its appellate jurisdiction to any other court of equal or superior jurisdiction,‖ but that power seems to have been taken away by the new Act which lays down that nothing in s. 224 shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision.¶ Subject to this and the other provisions of Part IX of the Constitution Act or of any Order in Council made under this Act or any other Act and of any valid Act of the appropriate legislature,** the jurisdiction of, and the law administered in, any

* s. 33 (3) (*d*).

† s. 78 (3) (*d*).

‡ Keith: *The Governments of the British Empire*, p. 560.

§ *Ibid.*, p. 578.

‖ s. 107 (*b*).

¶ s. 224 (2). For the purposes of s. 555 of the Criminal Procedure Code, s. 224 of the Government of India Act, 1935, has been substituted for s. 107 of the Government of India Act, 1915.

** s. 226 and entry 2 in List II of the Seventh Schedule.

existing High Court, and the respective powers of the judges thereof in relation to the administration of justice in the court shall, however, be the same as immediately before the commencement of Part III of the Act * Besides, if on an application properly made a High Court is satisfied that a case pending in an inferior court, being a case which the High Court has power to transfer to itself for trial, involves or is likely to involve the question of the validity of any Federal or Provincial Act, it shall exercise that power † An application in this behalf shall not be made except, in relation to a Federal Act, by the Advocate-General for the Federation and, in relation to a Provincial Act, by the Advocate-General for the Federation or the Advocate-General for the Province ‡

Powers of High Courts curtailed

This reduction in power as contemplated in s 224 (2) is extremely unfortunate in view of the constitution of special tribunals or Boards set up from time to time under special laws and the extraordinary powers vested in them It may have undesirable *consequences so far as the civil liberties of the people and* the rights of minorities or classes are concerned In this respect the present system is decidedly a change for the worse as compared with the one it has replaced unless reliance can be placed in a given case on the provisions of s 225

As in the case of the composition of the Council of Ministers at the Centre or in a Province, there is no statutory provision for representation of minorities in the Federal Court or in any High Court But it has been a long established convention in this country that in the appointment of judges of the High Courts the claims of important minorities are taken into consideration, and that convention has been followed in selecting the personnel of the Federal judiciary § There is wide support for such practice, but what

* s 223

† s 225 (1)

‡ s 225 (2)

§ Of the three judges including the Chief Justice at present constituting the Court, one is a European Christian another is a Mahomedan and the third is a Hindu All the

should at the same time be borne in mind is that efficiency must not be sacrificed to the claims of any community.

Departmental legislation and judicial control.

Now it is a well-known fact that modern legislation is so massive in bulk and so varied in character that the legislature in ordinary circumstances is not competent to deal with it in all its details during the short time at its disposal. The practice has, therefore, developed of passing Acts in broad and general terms and of leaving the details to be filled in by the departments concerned. This is inevitable; but it is exceedingly unwise, and perhaps dangerous, to give the executive departments complete immunity from ultimate judicial supervision and control. The departments should not be allowed to act both as a rule-making authority and as judge on their own acts. The judiciary should have power in such matters to decide whether the rules promulgated or orders passed by the executive are legal and within jurisdiction or not. The executive, in other words, must not be allowed to legislate in such a manner as to oust the jurisdiction of competent courts in regard to administrative law-making.

International guarantees for minorities.

The question has been raised as to whether or not the subject of minorities protection in India should be subject to international control. In this connection there is a certain section of opinion in the country which has suggested that the principles and procedure laid down by the League of Nations should be adopted here. It raises an important issue beyond the limits of Municipal Law. The Austinian theory of sovereignty, which in practice has hardly ever held the field, has now undergone a radical change under the stress of modern circumstances; for mankind, it is now generally admitted, have suffered much from the presumption that "once a people had become master in its own house there was no limit to its power." Democracy itself is no guarantee of freedom and the rule of law. The problem of freedom raises issues much wider and larger than what internal

three appointments seem to have won general approval. The new appointment to fill the vacancy caused by Mr. Justice Jayakar's elevation to the Judicial Committee is in accord with the general practice.

sanctions alone can tackle efficiently and satisfactorily. It raises issues such as the freedom of the individual set over against the community of which he is a member, the freedom of groups set over against the State and the relation of States with one another. Viewed in this light the subject of minorities protection in India as in all other countries has both national and international aspects.

But the League of Nations has created a very bad precedent and undermined its prestige as an International Court of Arbitration by having excluded from its jurisdiction a large number of European States that are its members Moreover, recent developments in Europe and outside give no hope that the League and its members will ever be able to act effectively in pursuance of the ideals which they profess in face of the threats of European dictators Unless the effectiveness of the League is convincingly demonstrated there is no sense in searching desperately for the Geneva cure for the ills from which India is suffering at present There is again a legal difficulty in bringing India under League control in respect of the protection of minorities inasmuch as no part of the British Empire including India is bound by any Minorities Guarantee Treaty, Convention or Declaration The League cannot, therefore, of its own accord apply the principles of minorities protection and the procedure of its control to this country Its functions, which have been clearly defined in the Treaties, Conventions or Declarations, are restricted to minorities of those countries with which the Treaties have been concluded or which by Conventions or Declarations have accepted the principles of these instruments Nor should the fact be forgotten that in no case, Treaty or no Treaty, can a petition by a majority legally seize the League for the purposes of protection according to the existing procedure

For the expansion of the League's functions in regard to the protection of minorities in different parts of the world, it is submitted that while the present is not without suspicion and uncertainty largely on account of a new phase of aggressive nationalism in various parts of Europe and the humiliating position to which the League and its members have been reduced, the future seems to lie in the evolution of effective international understandings and practices backed up by necessary sanctions In-

trinsically and in ultimate analysis the problem of national minorities complicated as it is by such issues as immigration, colonisation, nationality rights, alteration of State boundaries, the reciprocal transfer of populations from one State to another on a compulsory or voluntary basis, etc., is international in its bearings rather than municipal; and it is hoped that nations would submit to expert and impartial arbitration where undue emphasis on national status and rights threatens to prove a disrupting and distintegrating world-force.

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